NAVAL WAR COLLEGE

INTERNATIONAL LAW TOPICS AND DISCUSSIONS

1913

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WASHINGTON
1914


UNITED STATES OF AMERICA
GOVERNMENT PRINTING OFFICE

PREFACE.

The discussions of the international law topics of 1913 were conducted as in previous years by Mr. George Grafton Wilson, professor of international law at Harvard University, who also drew up the notes upon the topics which are now published for the information of the Navy.

The usual form of the situations was somewhat altered this year owing to the approaching Third Hague Conference, at which it is probable that a code of naval warfare will be proposed for adoption.

In view of this probability, it seemed well this year for the conference of officers to draft regulations suitable for embodiment in the code. By following this course the views of naval officers upon certain of the more pressing questions of this branch of international law are offered for the consideration of the naval service and of others who are interested in the subject.

The notes upon the topics now presented serve to bring discussion and opinion upon them up to date and to consider certain subjects which previously have been discussed little or not at all at the Naval War College. In this volume the presentation of topics which have been previously discussed is shortened and reference is to the earlier volumes. In the presentation of the topics which have received little attention at the Naval War College the discussion is correspondingly amplified. Many of these topics are under consideration throughout the world and opinion is changing. The opinions given in recent international conferences are shown so far as the limits of the work have permitted.

The president of the Naval War College requests comment on the regulations and conclusions upon these topics, as well as suggestions for subjects to be considered at the college in the future, particularly such as relate to those likely to be brought before The Hague Conference affecting naval conduct.

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TABLE OF CONTENTS.

INTERNATIONAL LAW TOPICS AND DISCUSSIONS.

Topic I.

MARGINAL SEA AND OTHER WATERS.

What regulations should be made in regard to the use in time of war of the marginal sea and other waters?

REGULATIONS.

1. Acts of war are prohibited in neutral waters and in waters neutralized by convention.

2. "Belligerents are bound to respect the sovereign rights of neutral powers and to abstain in neutral waters from all acts which would constitute, on the part of the neutral powers, which knowingly permitted them, a nonfulfillment of their neutrality."

3. The area of maritime war:

(*a*) The sea outside of neutral jurisdiction.

(*b*) Gulfs, bays, roadsteads, ports, and other waters of the belligerents.

4. Limitations:

(*a*) Marginal sea.—The jurisdiction of an adjacent state over the marginal sea extends to 6 miles (60 to a degree of latitude) from the low-water mark.

(*b*) Roadsteads.—The jurisdiction over roadsteads is the same as over the sea.

(*c*) Gulfs and bays.—The jurisdiction of an adjacent state over the sea extends outward 6 miles from a line drawn between the opposite shores of the entrance to the waters of gulfs or bays where the distance first narrows to 12 miles.

(*d*) Straits.—(1) Straits not more than 12 miles in width are under the jurisdiction of the adjacent states. (2) Innocent passage through straits connecting open seas is permitted.

(*e*) Canals.—(1) (*a*) Canals or artificial waterways within neutral jurisdiction are closed or open to vessels of war during hostilities, according to the regulations

which have been established prior to the declaration of war. (*b*) No act of hostility shall take place within these waters. (2) (*a*) Canals or artificial waterways within belligerent jurisdiction when national in character may be closed during war, but should, if possible, be open to innocent vessels of neutral powers. (*b*) Canals or artificial waterways of mixed character which are not of grand importance to the commerce of the world may be similarly closed. (*c*) Canals or artificial waterways which are strictly international and form main highways of world commerce may be closed to all vessels of a power at war with the power which in time of peace is in control of the canal or artificial waterway.

NOTES.

Early ideas on marginal sea.—It is evident from the works of ancient writers that the sea was often regarded as susceptible of possession in the same manner as land. There were also early declarations, as among Roman jurists, that "the use of the sea is as free to all men as the air." The idea of maritime sovereignty was the prevailing one, however, during the Middle Ages. The prevalence of lawlessness at sea in the form of piracy and otherwise during the Middle Ages required a strong hand to suppress. It was natural that a state should protect its neighboring trade routes, and its own traders, as well as foreign traders also, would gladly yield obedience in return for this protection. The commerce of the Italian states was, during this period, very important. The marriage of the sea celebrated by the city of Venice from the latter part of the twelfth century was emblematic of the authority which that city had at the time over the Adriatic. Venice from time to time claimed and exercised the privilege of excluding others from the use of the Adriatic. The restrictive measures were usually taken with a view to protecting trade and commerce in these early days.

Grotius sums up the best opinion of the early days of the seventeenth century, though not following Gentilis, saying:

> It would seem that dominion over a part of the sea is acquired in the same manner as other dominion; that is, as said above,

because it appertains to a person or to a territory—as appertaining to a person when he has a fleet, which is a sea army, in that part of the sea; as appertaining to territory in so far as those who sail in the adjacent part of the sea can be commanded from the shore no less than if they were upon land. (De Jure Belli ac Pacis. Lib. II., c. 3, 13.)

Bynkershoek in 1702 tried to make this more definite by stating that the dominion over the sea ceased with the limit of the range of cannon shot. (De Domino Maris, c. 2.)

To the position of Grotius, Selden in 1635 had been bitterly opposed. Molloy, writing later in the seventeenth century, says:

After the writings of the illustrious Selden, certainly it is impossible to find any prince or republic or single person indued with reason or sense that doubts the dominion of the British sea to be entirely subject to that imperial diadem. (De Jure maritimo, Bk. I, chap. 5, 1.)

And as the sea is capable of protection and government, so is the same no less than the land subject to be divided amongst men, and appropriated to cities and potentates, which long since was ordained of God as the thing most natural. (Ibid., 4.)

The point of view of those who claimed that the open sea was, as said in the Roman law, "by nature common to all," however, gradually prevailed, particularly in the eighteenth century, yet the line at which the open sea began in distinction from the line of the marginal sea continued to be a subject of controversy.

Early control.—In ancient times the control of the sea was not considered a matter of much importance. During the period of Roman power, that state exercised a considerable control for the protection of the different parts of its dominion.

During the Middle Ages, with the development of maritime commerce and of competition, the Mediterranean and the waters about the coasts of western Europe became the subject of conflicting claims. The Venetians seemed to have maintained their control of the waters of the Adriatic till the seventeenth century, requiring that those who sailed its waters have permission, and in return they afforded a degree of protection.

In the extreme and positive practice early followed by Great Britain can be found precedents for the claims to most absolute control of later days. King Edgar in 964 seems to have assumed the title not merely of King of the land but of the circumjacent seas. Later, acts of Parliament were passed assuming sovereignty over the neighboring seas. The formula used by the English kings usually implied that while they assumed the dominion, they proposed to exercise the authority and defend the seas.

In the English seas, as elsewhere, the exercise of protection was not a gratuitous function of the state. In some seas tolls had been collected for protecting the foreign vessels from pirates, etc. The requirement of a salute of the flag was common in the English seas. The sovereignty of the English seas was formally recognized to reside in the English crown by a memorial presented by the representatives of merchants of several states in the early part of the fourteenth century. These British claims and the exercise of control continued. Selden, in his book "Mare Clausum" (1635), gave expression to the most extreme forms of these claims.

What had been done by England was done by many other states, so that the movement of vessels upon the seas and in the waters near the coasts of many countries was often fraught with impediments and inconveniences. The extreme claims to control by Spain and by Portugal in the period of the sixteenth century to all the neighboring waters to 100 miles' limit and even beyond if the waters were not under another sovereignty, and some claims to the whole Atlantic Ocean within certain lines, seem to have brought a reaction. From the beginning of the seventeenth century, particularly from the issue of Grotius's "Mare Liberum" in 1609, the doctrine of limited control gained in influence. That this control should be effective was the principle advocated by Bynkershoek in 1702 in his "De Dominio Maris." That effective control could be maintained to a limit of cannon shot from shore appealed to the minds of men as reasonable, and this is the form which was embodied in many treaties,

and this doctrine became the basis of modern practice. The varying methods which had been resorted to in earlier times gradually assumed a degree of uniformity under the spread of the doctrine of Bynkershoek that the land dominion ended with the range of arms, "potestas terrae finitur ubi finitur armorum vis." The doctrine of the Roman law freedom of the sea was revived and amplified and brought to the support of the modern doctrine of the exercise of control.

Later ideas.—The ideas of the right to exercise jurisdiction within the marginal sea became more definite as the limits of this area became better established. The questions most frequently arising related to fishing. It has gradually come to be recognized that in absence of treaties the exclusive right to regulate fishing in marginal seas is in the adjacent state and also that a state or states can make regulations for their own nationals beyond the marginal limits. The basis of later ideas changed somewhat, and it was considered that the marginal sea should be under jurisdiction of the adjacent state, not merely because a shot could reach across the area, but because such jurisdiction was necessary for the well-being of the state, and even for its safe and convenient existence, and that the exercise of such jurisdiction within a limited area would not involve any disadvantage to other states which would be commensurate with the advantage to the adjacent state.

The exercise of jurisdiction within this marginal area has now come to cover in time of peace the execution of municipal laws in regard to revenue, sanitary and fishery regulations in an exclusive manner, and the execution of somewhat less rigorous regulations in regard to navigation and criminal offenses, unless the criminal act takes effect outside the vessel. In time of war there is still much difference in the practice of states. Examples of varying domestic regulations may be found in the legislation of many states. During the eighteenth century maritime jurisdiction received much attention.

Great Britain.—A statute of 9 George II, c. 35 (1736), assumes jurisdiction over any person or persons who

"shall be lurking, waiting, or loitering within 5 miles from the seacoast or from any navigable river" and suspected of intended violation of the revenue laws. (Sec. 18.) In the same act jurisdiction is assumed "within 2 leagues of the shore" (sec. 22) and transshipment of goods without payment of duties is prohibited "within the distance of 4 leagues from any of the coasts of this kingdom." The regulation relating to the jurisdiction over 2 leagues was in 1763, by a statute of 4 Geo. III, Cap. 15, extended to the American colonies.

Early opinion in United States.—A letter of Jefferson, Secretary of State, to the British minister, of November 8, 1793, showed the attitude of the Government at that time:

SIR: The President of the United States, thinking that, before it shall be finally decided to what distance from our seashores the territorial protection of the United States shall be exercised, it will be proper to enter into friendly conferences and explanations with the powers chiefly interested in the navigation of the seas on our coasts, and relying that convenient occasions may be taken for these hereafter, finds it necessary in the meantime to fix provisionally on some distance for the present government of these questions. You are sensible that very different opinions and claims have been heretofore advanced on this subject. The greatest distance to which any respectable assent among nations has been at any time given has been the extent of the human sight, estimated at upward of 20 miles, and the smallest distance, I believe, claimed by any nation whatever is the utmost range of a cannon ball, usually stated at a sea league. Some intermediate distances have also been insisted on, and that of three sea leagues, has some authority in its favor. The character of our coast, remarkable in considerable parts of it for admitting no vessels of size to pass near the shores, would entitle us, in reason, to as broad a margin of protected navigation as any nation whatever. Reserving, however, the ultimate extent of this for future deliberation, the President gives instructions to the officers acting under his authority to consider those heretofore given them as restrained for the present to the distance of one sea league, or three geographical miles, from the seashores. This distance can admit of no opposition, as it is recognized by treaties between some of the powers with whom we are connected in commerce and navigation and is as little, or less, than is claimed by any of them on their own coasts.

The law of June 5, 1794, the Neutrality Act, declares:

SEC. 6. *And be it further enacted and declared*, That the district courts shall take cognizance of complaints by whomsoever instituted in cases of capture made within the waters of the United States or within a marine league of the coasts or shores thereof.

It is possible that the limits of the marginal sea may be extended by pushing out from land the line from which the marine league is to be measured. Such a method is mentioned in a letter of President Jefferson to the Secretary of the Treasury in 1804.

DEAR SIR: As we shall have to lay before Congress the proceedings of the British vessels at New York, it will be necessary for us to say to them with certainty which specific aggressions were committed within the common law, which within the admiralty jurisdiction, and which on the high seas. The rule of the common law is that wherever you can see from land to land all the water within the line of sight is in the body of the adjacent country and within common-law jurisdiction. Thus, if in this curvature  you can see from *a* to *b*, all the water within the line of sight is within common-law jurisdiction, and a murder committed at *c* is to be tried as at common law. Our coast is generally visible, I believe, by the time you get within about 25 miles. I suppose that at New York you must be some miles out of the Hook before the opposite shores recede 25 miles from each other. The 3 miles of maritime jurisdiction is always to be counted from this line of sight.

The United States has made other extreme claims at various times. The Gulf Stream has seemed to some the natural and proper limit of maritime jurisdiction. John Quincy Adams relates in his Memoirs that in 1805, on November 30, he paid a visit to President Jefferson.

The President mentioned a late act of hostility committed by a French privateer near Charleston, S. C., and said that we ought to assume as a principle that the neutrality of our territory should extend to the Gulf Stream, which was a natural boundary, and within which we ought not to suffer any hostility to be committed. M. Gaillard observed that on a former occasion, in Mr. Jefferson's correspondence with Genet, and by an act of Congress at that period, we had seemed only to claim the usual distance of 3 miles from the coast; but the President replied that he had then assumed that principle because Genet by his intemperance forced us to fix on some point, and we were not then prepared to assert the claim of jurisdiction to the extent

we are in reason entitled to; but he had then taken care expressly to reserve the subject for future consideration, with a view to this same doctrine for which he now contends. I observed that it might be well, before we ventured to assume a claim so broad, to wait for a time when we should have a force competent to maintain it. But in the meantime, he said, it was advisable to squint at it, and to accustom the nations of Europe to the idea that we should claim it in future. (Memoirs, J. Q. Adams, p. 375.)

Bering Sea.—After the acquisition of Alaska by purchase from Russia in 1867 the United States came into possession, according to the terms of the convention with the Czar, of "all the territory and dominion now possessed by his said Majesty on the continent of America and in the adjacent islands" within the specified limits of the Russo-British treaty of February 28/16, 1825. Under this convention the United States advanced some of the claims that Russia had previously advanced. In 1890 Mr. Blaine, Secretary of State, maintained that the irregular taking of seals in the Bering Sea was contra bonos mores, and that the United States had jurisdiction sufficient to prevent such acts. Great Britain maintained that fur seals in the high seas were res nullius. The matter of jurisdiction of the United States in Bering Sea was referred in 1892 to a tribunal of arbitration. This tribunal decided that the United States had no exclusive jurisdiction outside the ordinary 3-mile limit.

Revenue purposes.—The act of March 2, 1797, provided that the United States would assume jurisdiction for revenue purposes 4 leagues from the coast.

SEC. 2760. The officers of the revenue cutters shall respectively be deemed officers of the customs and shall be subject to the direction of such collectors of the revenue or other officers thereof, as from time to time shall be designated for that purpose. They shall go on board all vessels which arrive within the United States or within 4 leagues of the coast thereof, if bound for the United States, and search and examine the same, and every part thereof, and shall demand, receive, and certify the manifests required to be on board certain vessels, shall affix and put proper fastenings on the hatches and other communications with the hold of any vessel, and shall remain on board such vessels until they arrive at the port or place of their destination.

This practice for the enforcement of revenue laws seems to meet with little objection, and is also observed by other states.

American treaty provisions.—In the treaty between the United States and Great Britain in 1794, Article XXV, it is provided that—

> Neither of the said parties shall permit the ships or goods belonging to the subjects or citizens of the other to be taken within cannon shot of the coast, nor in any of the bays, ports, or rivers of their territories, by ships of war or others having commission from any prince, republic, or state whatever. But in case it should so happen, the party whose territorial rights shall thus have been violated shall use his utmost endeavors to obtain from the offending party full and ample satisfaction for the vessels so taken, whether the same be vessels of war or merchant vessels.

This article expired in 1807.

The treaty of Gaudalupe-Hidalgo of 1848 between the United States and Mexico states:

> ART. V. The boundary line between the two Republics shall commence in the Gulf of Mexico, 3 leagues from land, opposite the mouth of the Rio Grande.

This portion of the treaty was reaffirmed in the Gadsden treaty of 1853. To a complaint of the British minister in regard to this clause in 1848, Mr. Buchanan, Secretary of State, replied:

> I have had the honor to receive your note of the 30th April last objecting, on behalf of the British Government, to that clause in the fifth article of the late treaty between Mexico and the United States by which it is declared that "the boundary line between the two Republics shall commence in the Gulf of Mexico 3 leagues from land" instead of 1 league from land, which you observe "is acknowledged by international law and practice as the extent of territorial jurisdiction over the sea that washes the coasts of states."
>
> In answer I have to state that the stipulation in the treaty can only affect the rights of Mexico and the United Sates. If for their mutual convenience it has been deemed proper to enter into such an arrangement, third parties can have no just cause of complaint. The Government of the United States never intended by this stipulation to question the rights which Great Britain or any other power may possess under the law of nations. (1 Moore, Digest Int. Law, p. 730.)

Opinions.—Pradier-Fodéré, summing up various doctrines, says:

La prolongation de la souveraineté et de la jurisdiction de l'etat sur la portion de mer qui, touchant immédiatement ses côtes, forme en quelque sorte la ligne défensive de son territoire et peut être considérée comme une continuation de sa frontière, est fondée sur le droit de l'etat d'assurer sa sécurité et la protection des intérêts commerciaux et fiscaux du pays. (Cours de Droit Int. Pub. II. ch. 5.)

Wheaton, speaking of the "marine league, or as far as a cannon shot will reach from the shore," says:

Within these limits its (the state's) rights of property and territorial jurisdiction are absolute, and exclude those of every other nation. (International Law, Pt. II, sec. 177.)

British territorial waters jurisdiction act of 1878 says:

Any part of the open sea within 1 marine league of the coast measured from low-water mark shall be deemed to be open sea within the territorial waters of Her Majesty's dominions.

The British Manual of Naval Prize Law, prepared by Prof. Holland and issued in 1888, declares, in regard to war powers, that—

2. These powers may be exercised in any waters except the territorial waters of a neutral state. The territorial waters of a state are those within 3 miles from low-water mark of any part of the territory of that state, or forming bays within such territory; at any rate, in the case of bays the entrance to which is not more than 6 miles wide.

Hautefeuille shows that the early publicists fixed varying limits to maritime domain. Casaregis gives 100 miles; Baldus and others, 60 miles; Loccenius, two days' journey; many treaties indicate 2 leagues; some writers think the extent and power of the state should determine. (I Droits et Devoirs de Nations Neutres, Titre I, chap. 3, sec. 1.) He finally concludes: "La plus grande portée du cannon monté à terre est donc réellement la limite de la mer territoriale." (Ibid.) He argues for this, as many since have argued, that this area, being within range of cannon, is under effective control of the adjacent state and should belong to that state.

The proposition that hostilities in time of war be restricted to the area within the jurisdiction of the two belligerents, and that the high seas be free from conflict, has been made. Neutral and belligerent commerce would under this plan be exempt on the high sea and belligerent war vessels would be liable only in belligerent waters. Under such a regulation it would seem necessary to extend the jurisdiction in the marginal sea in order to permit hostilities with the long-range guns of the present day.

It should be said of all declarations by states, or by rulers fixing or claiming maritime jurisdiction of an exceptional character or to an exceptional extent, that such declarations do not create rights as against other states. The citizens of the states making the declarations may be under obligations to observe their provisions, but the rights appertaining to the citizens of other states by the law of nations are not abridged by domestic acts of adjacent states.

Waters of belligerents.—In time of war the marginal sea or other waters may be within the jurisdiction of a belligerent or within the jurisdiction of a neutral. The marginal seas or other waters within the jurisdiction of the belligerent, unless exempt by special treaty agreement, are within the legitimate area of hostilities.

Neutral waters.—The neutral has the right of jurisdiction of waters which appertain to neutral territory. In early times the belligerent paid little attention to neutral claims. From the days of the armed neutrality of 1780 neutral rights have gradually received more consideration. For a considerable period the obligation rested upon the neutral to protect its neutrality. The authorities upon international law enumerated degrees and kinds of neutrality, and the belligerents took advantage of any special privileges which would be of service to them. Treaties were often made in times of peace which would give to one state special privileges not enjoyed by other states in time of war. Later even the idea of impartiality

was considered as insufficient evidence of a spirit of neutrality because the operation of impartial rules might easily be favorable to one state while unfavorable to another; e. g., the grant of unlimited loans to each belligerent might be of great service to a belligerent which had no resources, and of no service to a belligerent which had abundant resources.

Toward the end of the nineteenth century, particularly after the Alabama award, the doctrine of neutrality became more and more defined, and the idea that a neutral should refrain from all connection with the hostilities became general. Certain burdens were placed on the neutral by the expansion of the "due-diligence" clause. The idea that there were certain duties of abstention, prevention, toleration, and regulation was gradually recognized, as in state loans, use of territory as base, visit and search, sojourn of vessels in neutral ports, etc.

National regulations and claims.—The regulations enacted by domestic legislation show considerable variation, and the claims are sometimes even more divergent.

Austria-Hungary.—The Austro-Hungarian regulations seem generally to recognize a cannon shot and a marine league as interchangeable expressions, but have special regulations extending revenue jurisdiction to 12 miles, and special regulations for fisheries and in time of war.

Belgium.—The Belgian regulations of 1901 contain very detailed and specific provisions in regard to the use of territorial waters. These regulations provided for the duration of sojourn of foreign ships of war even in time of peace. In time of war the regulations are very stringent; e. g., the commander of any belligerent vessel may be invited "to furnish accurate information touching the flag, the name, the tonnage, the engine power, the crew of his vessel, her armament, the port of departure, the destination, as well as other information necessary to determine, if need be, the repairs or supplies of provisions and coal that may be necessary." (Art. XII.)

Brazil.—The regulations in regard to the use of Brazilian waters, issued at the time of the Spanish-American war in 1898, were definite in form, though not describing exactly what area is included in territorial waters.

XX. Neither of the belligerents may take prizes in the territorial waters of Brazil, place themselves in ambuscade in the ports or anchorages, islands, or capes situated in those waters to watch for hostile ships coming in or going out; try to get information in regard to those which are expected, or are to go out; or, finally, to make sail to chase a hostile ship sighted or signaled.

All necessary means, including force, will be employed to prevent prize taking in territorial waters.

XXI. If prizes brought to the ports of the Republic shall have been taken in territorial waters, the things coming out of them shall be taken possession of by the competent authorities, in order to restore them to their lawful owners, the sale of such things being always taken and considered as void.

XXII. Ships which shall try to violate neutrality shall be immediately warned to leave the maritime jurisdiction of Brazil, and nothing shall be furnished them.

The belligerent who shall infringe the requirements of this circular shall be no more admitted into the ports of Brazil.

France.—The Instructions issued by France on December 19, 1912, provide:

ARTICLE V.—*Respect des droits des États neutres.*—22. Vous vous conformerez strictement aux interdictions imposées aux belligérants par la Convention XIII de La Haye, du 18 octobre 1907, concernant les droits et devoirs des Puissances neutres en cas de guerre maritime.

23. Pour l'application de cette Convention, vous considérerez les eaux territoriales comme ne s'étendant jamais à moins de trois milles des côtes, des îles ou des bancs découvrant qui en dépendent, à compter de la laisse de basse mer, et jamais au delà de la portée de canon.

Vous trouverez dans l'annexe II le tableau des Puissances qui, soit dans un texte légal ou réglementaire, soit dans une déclaration de neutralité, ont fixé la limite de leurs eaux territoriales, quant au droit de la guerre, à une distance de la côte supérieure à trois milles.

Vous respecterez toute limite de cette nature qui se trouverait ainsi régulièrement fixée avant l'ouverture des hostilités. (See Appendix.)

The Annexe II referred to above is as follows:

Tableau des États qui ont fixe une étendue de leurs eaux territoriales supérieure à trois milles, quant au droit de la guerre.

États.	Étendue des eaux territoriales.	Observations.
Russie	Portée de canon	Pour la mer Blanche, limite s'étend à 3 milles, au large de la ligne joignant les caps Sviatoi Noss et Kaninn Noss.
Suède	4 milles, et, près d'une forteresse, la portée des canons de cette forteresse.	A partir de l'îlot non submergé le plus éloigné de la côte.
Norvège	4 milles	A partir de l'îlot non submergé le plus éloigné de la côte.
Danemark	4 milles.	
France	6 milles.	
Espagne	6 milles.	
Portugal	6 milles.	
Italie	Portée de canon.	

Germany.—Germany has usually claimed a cannon shot as the limit of jurisdiction seaward. Some German authorities, realizing that the range of cannon would probably increase, have proposed that the powers meet to readjust the limits of marginal sea from time to time and at intervals of 10 years.

Italy.—A law of June 16, 1912, regulates the passage and stay of merchant vessels upon Italian coasts:

ARTICLE 1er. Le transit et le séjour des navires marchands nationaux ou étrangers peuvent être défendus, en quelque temps que ce soit et dans un lieu déterminé quelconque, intérieur ou extérieur des mers de l'Etat, quand cela sera reconnu nécessaire a l'intérêt de la défense nationale. Aux seuls effets de la présente loi, par "mers de l'Etat" on entend la zone de la mer comprise entre dix milles marins du rivage. En ce qui concerne les golfes et les baies, la zone des dix milles est mesurée à partir d'une ligne droite tirée en travers de la sinuosité dans la partie la plus extérieure où l'ouevrture n'a pas une largeur supérieure à vingt milles. (Gazzetta ufficiale du 27 juin, 1912, n° 151.)

Japan.—The Japanese regulations governing captures at sea, of March 15, 1904, contain a provision similar to the Russian regulations.

ART. II. No visit, search, or capture shall be made in neutral waters, nor in waters clearly placed by treaty stipulations outside the zone of hostile operations.

Norway and Sweden.—Both Norway and Sweden, before, during, and since their union, have maintained 4 miles as the limit of maritime jurisdiction. Even their early laws specify that this distance shall be measured from the most remote islet which is exposed at low tide. Scandinavian writers argue that as many continental states maintain the extent of jurisdiction as the range of a cannon shot from shore, their contention for 4 miles is really a moderate one, as the range of cannon shot is much greater.

For control of fishing, the Norwegian claim in the seventeenth century (1636) extended even to 4 or 6 leagues.

The Swedish jurisdiction for revenue purposes has been fixed ordinarily at 6 miles.

The above jurisdiction becomes of special importance because practically uniform rules of neutrality were proclaimed for the waters of Denmark, Norway, and Sweden by concurrent agreement on December 21, 1912, and published on December 24. No change in the rules were to be made by one state without consulting the others.

Russia.—A Russian ukase of September 7, 1821, relating to the Bering Sea, forbade all foreign vessels, except in case of distress, "not only to land on the coasts and islands belonging to Russia, as stated above, but also to approach them within less than a hundred Italian miles." Both the United States and Great Britain protested against this position of Russia.

In 1911 a bill was before the Russian Duma proposing to restrict fishing within 12 miles along the coast of the White Sea. This proposed law raised protests from several states and became a matter of inquiry in the British Parliament, where the sentiment of the Government was opposed to the elimination of the 3-mile limit of jurisdiction.

The Russian Regulations on Maritime Prizes, approved by the admiralty board September 20, 1900, and made

operative for the Russo-Japanese War of 1904–5, provide in article 16 that—

The stoppage, examination, and detention of hostile or suspicious vessels and cargoes is permitted throughout the extent of the ocean and other waters, with the exception of those under the dominion of a neutral power or those excluded from military operations by special international agreements. (Foreign Relations, U. S. 1904 p. 737.)

Spain.—The Spanish claims to jurisdiction seem to extend in ordinary cases to 6 marine miles.

Special regulations.—During the Russo-Japanese war of 1904–5 several states made known in their neutrality proclamation that they proposed to restrict the use of certain waters in special respects.

Denmark.—" If warlike operations should extend to the vicinity of Denmark, the inner waters south of Sealand limited by the meridians of Omö and Stege shall be closed by means of stationary submarine mines; and ships of war belonging to either belligerent shall not be permitted to enter these waters nor the roadstead and harbor of Copenhagen, except in evident stress of weather, in which case such entrance shall be made public." (Foreign Relations, U. S., 1904, p. 21.)

Sweden and Norway.—The King has decided—

1. To interdict to war vessels of the belligerents entry to the territorial waters within the fixed submarine defenses, as well as to the following ports:

(*a*) In Sweden:

Stockholm, comprising the waters within a line commencing at Spillersboda, on the Swedish Continent, and passing Furusund, Sandhamn, and Fiversätraö, to Dalarö and another line, Herrhamra-Landsort-Ledskär.

Karlskrona, within the fixed submarine defenses;

Fårösund, the entrance from the north, comprising the waters within a line connecting Vialmsudde with Hällergrundsudde, and the entrance from the south, comprising the waters within a line Ryssnäs—boundary of Bungeör-Bungnäs; and

Slite, comprising the waters within the true north and west lines connecting the boundary of Magö with the mainland of the island of Gottland.

(*b*) In Norway:

The port of Fredrikshald;

The fjord of Kristiania inside of Bastö;

The fjord of Tönsberg inside of Natholmen and of the lighthouses of Östre Vakerholmen, of Mogerötangen, and of Vallö;

The port of Kristianssand with the waters inside of Fredriksholm and of the lighthouses of Oxö, of Grönningen, and of Torsö;

The port of Bergen with its entrances (a) Byfjorden inside of Hjelteskjaer-Stangen, (b) The entrance from the north inside of Herlö-Agnö-Bognö;

The fjord of Trondhjem inside of the fortifications of Agdenes; and

The port of Vardö. (Ibid, p. 31.)

Institute of International Law, 1894.—The question of the limit of jurisdiction over the marginal sea has received much attention from the Institute of International Law. The report of Sir Thomas Barclay, in 1894, showed that there had been such lack of unanimity as to the limit of jurisdiction that he had deemed it expedient to leave the number of miles in the proposed rules to be filled in by the Institute.

The report of 1894 showed a tendency to make a distinction between the limit to be prescribed for the exercise of jurisdiction in time of war and the limit which should be prescribed for the exercise of control of fishing and similar purposes. Some authorities of great weight stood firmly for an extension of the maritime jurisdiction to the limit of the range of cannon shot. M. de Martens, of Russia, held that this range was the real basis upon which the limit of jurisdiction should be determined, and that accordingly the limit would vary as the range of cannon increased. To M. de Martens the 3-mile limit seemed obsolete and illogical. He proposed 10 miles as a convenient conventional limit. If the doctrine of Bynkershoek is to be followed to its logical conclusion, and "the land dominion is to be limited by the range of cannon," then there is reason for extending the marginal jurisdiction. If the question is one of the distance to which the adjacent state can in fact control the marginal waters, then the limit may be extended. This was frequently shown to be the attitude in the eighteenth century claims and writings.

The ideas expressed by the Institute of International Law in 1894 indicate that there is a common belief that the adjacent state has not merely jurisdiction, but also

sovereignty, over the marginal sea. The rule proposed by the Institute was:

Article premier. L'État a un droit de souveraineté sur une zone de la mer qui baigne la côte sauf le droit de passage inoffensif réservé a l'article 5. (XIII Annuaire, 1894–95, p. 329.)

Art. 5. Tous les navires sans distinction ont le droit de passage inoffensif par la mer territoriale, sauf le droit des belligérants de réglementer et, dans un but de défense, de barrer le passage dans ladite mer pour tout navire, et sauf le droit des neutres de réglementer le passage dans ladite mer pour les navires de guerre de toutes nationalités.

The Institute was basing its action upon a marginal limit of 6 miles instead of the generally recognized 3 milts. The Institute by another regulation had proposed to give the neutral state a right to extend the zone of control in time of war even to the range of a cannon shot.

It may be said that Sir Thomas Barclay, in 1894, after considering all the propositions which had been made to him as the reporter of the committee, judged 6 miles to be the limit which would be most in accord with general opinion, though in special cases this limit might be extended. The investigations and discussions resulted in the formulation of the proposed regulation in the following form:

Art. 2. La mer territoriale s'étend à 6 milles marins (60 au degré de latitude) de la laisse de basse marée sur toute l'étendue des côtes. (13 Annuaire de l' Institut de Droit International, p. 329.)

The same regulation was presented to the Institute in 1912.

The Institute in 1894 also proposed to give the neutral state a right in time of war to extend its zone of neutrality to the range of a cannon.

Art. 4. En cas de guerre, l'État riverain neutre a le droit de fixer, par la déclaration de neutralité ou par notification spéciale, sa zone neutre au delà de 6 milles, jusqu'à portée du canon des côtes. (XIII Annuaire, p. 329.)

The extent of marginal waters would, under this regulation if adopted, be very much enlarged, and the area of possible hostile action by belligerents would be cor-

respondingly decreased as regards neutral waters, but increased as regards the area which might be regarded as within belligerent jurisdiction. It would not be reasonable to grant that the neutral marginal sea could be extended in time of war unless the belligerent marginal sea might be similarly extended. The liability for cutting cables on the high sea, for example, would under this regulation be reduced, as nearly all cables if cut at all must be cut within range of cannon shot though perhaps not within 3 miles. If the neutral may thus extend the zone of neutrality to the range of a cannon, violations of neutrality will be more liable to occur, and the neutral will, under recent conventions, be under great obligations to prevent these violations. These and other possible consequences seem to have led to the suggestion in the report of 1912 that this article be eliminated from the proposed regulations.

Position of United States, 1896.—The proposition of the Institute of International Law in 1894 for a 6-mile limit of marginal sea was brought to the attention of the United States by the Netherlands minister, and a reply was made by Secretary Olney in 1896:

> In conformity with your recent oral request, I have now the honor to make further response to your unofficial note of November 5 last, which was acknowledged on the 9th of the same month, by informing you that careful consideration would be given to the important inquiry therein made as to the views of the United States Government touching the expediency of settling by treaty among the interested powers the question of the extent of territorial jurisdiction over maritime waters.
>
> This Government would not be indisposed, should a sufficient number of maritime powers concur in the proposition, to take part in an endeavor to reach an accord having the force and effect of international law as well as of conventional regulation, by which the territorial jurisdiction of a state, bounded by the high seas, should henceforth extend 6 nautical miles from low-water mark, and at the same time providing that this 6-mile limit shall also be that of the neutral maritime zone.
>
> I am unable, however, to express the views of this Government upon the subject more precisely at the present time, in view of the important consideration to be given to the question of the effect of such a modification of existing international and conventional

law upon the jurisdictional boundaries of adjacent states and the application of existing treaties in respect to the doctrine of headlands and bays.

I need scarcely observe to you that an extension of the headland doctrine, by making territorial all bays situated within promontories, 12 miles apart instead of 6, would affect bodies of water now deemed to be high seas and whose use is the subject of existing conventional stipulations. (Quoted in Moore, International Law Digest, Vol. I, p. 734.)

Institute of International Law, 1912.—A report to the Institute of International Law in 1912 by Sir Thomas Barclay retained the provision recommending 6 miles as the limit of jurisdiction over marginal sea, but it was proposed to strike out the regulation giving to a neutral state the right to extend its zone of marginal neutral waters in time of war to the range of a cannon shot, thus leaving the zone in peace, as in war, at the 6-mile line.

Conclusion.—The report presented to the Institute of International Law in 1912, to be more particularly considered at a later session, makes the following provision in regard to the area of hostilities.

ART. 1. *Théâtre des hostilités.*—Le théâtre de la guerre maritime comprend: 1° la mer ouverte; 2° les golfes, les baies, les rades, les ports et les eaux territoriales des belligérants, y compris leurs détroits et leurs canaux maritimes; 3° leurs eaux continentales servant à la navigation maritime, autant que des navires de guerre ennemis y pénètrent de la mer.

Des actes d'hostilité ne peuvent avoir lieu ni dans les eaux des États neutres, ni dans les parties de la mer, les détroits et les canaux conventionnellement neutralisés.

This does not, however, determine what are the limits of the respective waters.

General trend of the coast.—In measuring the limits of marginal sea the opinion seems to be that it may not be wise to follow all the minor sinuosities of the coast. These small indentations can not easily be discovered from the sea and may vary. The reasonable position has been held to be that in establishing the lines of limitation of the marginal sea, the general trend of the coast shall be followed in cases where questions arise. (Hague Arbitration, Norway *v.* Sweden, 1909.)

Regulations of The Hague conventions.—The regulations of the conventions agreed upon at The Hague in certain respects recognized a somewhat modern idea, viz, that the burden of the war should, so far as possible, fall exclusively upon the belligerents, and that neutrals should be freed from its consequences.

The first article of The Hague convention concerning the rights and duties of neutral powers in maritime war, which was signed in 1907 and proclaimed in 1910 by the United States, provides—

ARTICLE 1. Belligerents are bound to respect the sovereign rights of neutral powers and to abstain, in neutral territory or neutral waters, from all acts which would constitute, on the part of the neutral powers which knowingly permitted them, a non-fulfillment of their neutrality.

This article, which was adopted by the representatives at The Hague, was emphatically declared by the British delegate who presented it to be a formal recognition that the belligerents are bound to respect the rights of neutrals. (Deuxième Conférence, vol. 3, p. 572.)

In a general way "all acts of hostility" are forbidden in neutral waters. Some of the specific acts which are forbidden to belligerents are enumerated in this same convention; such are the setting up of prize courts in neutral jurisdiction, the use of neutral waters as a base, sojourn by belligerent ships in neutral waters for more than 24 hours, the bringing in of prize, etc. Under articles 25 and 26 the neutral state is bound to "exercise such surveillance as the means at its disposal allow to prevent" violations of its neutrality, and the exercise of its rights "can not be considered as an unfriendly act."

The report accompanying this convention, which is an official commentary upon its meaning, says:

Le principe qu'il convient d'affirmer tout d'abord c'est l'obligation pour les belligérants de respecter les droits souverains des États neutres. Cette obligation ne résulte pas de la guerre, pas plus que le droit d'un État à l'inviolabilité de son territoire ne résulte de sa neutralité. C'est une obligation et c'est un droit qui sont inhérents à l'existence même des États, mais qu'il est bon de rappeler expressément dans des circonstances où ils sont plus exposés à être méconnus. Suivant une parole de Sir Ernest Satow,

commentant un article de la proposition britannique auquel a été emprunté presque textuellement l'article 1 de notre projet, il y a là "l'expression de la pensée maîtresse de cette partie du droit international." (Séance du 27 juillet.)

Le principe est applicable à la guerre continentale comme à la guerre maritime, et il ne faut pas s'étonner que le réglement élaboré par le Deuxième Commission au sujet des droits et des devoirs des États neutres sur terre commence par cette disposition: "Le territoire des États neutres est inviolable."

D'une manière générale, les belligérants doivent s'abstenir dans les eaux neutres de tout acte qui, s'il était toléré par l'État neutre, constituerait un manquement à la neutralité. Il importe de remarquer, dès à présent, qu'un devoir du neutre ne correspond pas nécessairement à un devoir du belligérant et cela est conforme à la nature des choses. On peut imposer au belligérant l'obligation absolue de s'abstenir de certains actes dans les eaux de l'État neutre; il lui est aisé, et, dans tous les cas, possible de satisfaire à cette obligation, qu'il s'agisse des ports ou des eaux territoriales. On ne peut, au contraire, imposer à l'État neutre l'obligation de prévenir ou de réprimer tous les actes que voudrait faire ou ferait un belligérant, parce que très souvent l'État neutre ne sera pas en situation de remplir une pareille obligation. Il peut ne pas savoir tout ce qui se passe dans ses eaux et il peut n'être pas en état de l'empêcher. Le devoir n'existe que dans la mesure où on peut le connaître et le remplir. Cette observation reçoit son application dans un certain nombre de cas. (Deuxième Conférence Internationale de la Paix, Vol. I, p. 297.)

Use of terms in The Hague conventions.—In different articles of The Hague conventions different expressions are used. Sometimes the general terms "neutral waters" or "territorial waters" are used; sometimes more special terms, as "neutral ports and waters," "ports, roadsteads, or territorial waters," "neutral ports," "ports or roadsteads."

While the variation in the use of terms may not in some instances be entirely consistent with the plan of the conventions, in the convention concerning the rights and duties of neutral powers in maritime war, the use was recognized as giving rise to some difference of obligation as regarded the neutral power, but not as regard belligerents.

On a parfois à se demander s'il y a lieu de distinguer entre les ports et les eaux territoriales: la distinction se comprend en

ce qui concerne les devoirs du neutre, qui ne peut être au même degré responsable de ce qui se passe dans les ports soumis à l'action directe de ses autorités ou dans ses eaux territoriales sur lesquelles il n'a souvent qu'un faible contrôle; la distinction ne se comprend pas pour le devoir du belligérant, qui est le même partout. (Deuxième Conférence de la Paix, Vol. I, p. 298.)

If the limits of jurisdiction in marginal waters should be extended to 6 or more miles, there would be an increased difficulty in maintaining these rules.

Consideration of projects.—The admission of the claim of the right to exercise jurisdiction over the marginal sea would carry the corresponding obligation to exercise this jurisdiction. There would therefore be an increase in the extent of right together with that of duty.

The proposed assumption of a jurisdiction by the United States to the Gulf Stream in the Atlantic Ocean would involve obligations which the Government would probably be reluctant to assume. The claims to 100 miles, 60 miles, 20 miles, etc., would likewise involve large obligations. It should therefore be emphasized that the possession of jurisdiction, if granted, carries obligations as well as rights.

The extension of jurisdiction in the marginal seas is a corresponding reduction of the area which has formerly been considered as the high seas, an area generally recognized by all the states of the world as being outside the limits of possible appropriation or exclusive jurisdiction. Any change from the 3-mile limit which may be regarded as properly accepted should therefore be by general agreement of the maritime states.

The rights and duties of belligerents and neutrals would be materially modified by such a change.

The exercise of jurisdiction over area beyond the 3-mile limit has been generally admitted for purpose of enforcement of revenue laws and granted by convention for fishing and other purposes. There would accordingly be little difficulty in introducing more uniformity in these practices. Several states have signified willingness to make changes in their domestic regulations.

Summary.—A review of opinions, practice, treaties, and decisions shows that for fishing and neutrality the 3-mile limit has been generally recognized. For revenue, sanitary, and certain police purposes a wider jurisdiction has been admitted. Certain states in early times claimed very wide sovereignty over the sea. Some states at present claim more than 3 miles as the range of their jurisdiction. The present tendency as shown in international conferences is to extend the limits of maritime jurisdiction. Many states have shown a tendency to adopt 6 miles as the limit of maritime jurisdiction. Many treaties still exist which provide that the range of cannon shot determines the limit. It would seem, therefore, that indefiniteness has been and is common in the fixing of the limits of the jurisdiction of marginal seas. A definite limit is particularly to be desired. The development of guns and their increased and increasing range makes the doctrine of the limit of cannon shot uncertain. An uncertain and varying standard of measurement must lead to misunderstandings and often produce difficulties which should be avoided. Admittedly the present range of cannon shot would be an extreme limit of claim of jurisdiction. The 3-mile limit would be a most conservative claim. Many states have under differing conditions supported a claim to a limit between these. Such a limit should be within reasonable control of the adjacent state and should not be an undue impairment of the acknowledged freedom of the seas. It should be a limit which has received a reasonable support. Such requirements seem to be met in the following provisions:

Conclusion.—a (1) The jurisdiction over the marginal sea extends to 6 miles (60 to a degree of latitude). (2) The adjacent state has the right to exercise such jurisdiction over the marginal sea as is necessary for its well-being and for the maintenance of its obligations. (3) "Belligerents are bound to respect the sovereign rights of neutral powers and to abstain, in neutral waters, from all acts which would constitute, on the part of the neutral

powers which knowingly permitted them, a nonfulfillment of their neutrality."

Gulfs and bays.—Geographically a gulf is sometimes defined as a large bay, and a bay is defined as an expanse of water between two headlands. The headlands may be relatively near, and the definition is clear; but headlands may be very remote, and questions as to the nature of the expanse may arise. The Gulf of Mexico, the Bay of Biscay, the Gulf of Guinea, the Bay of Bengal, show the possible range of the terminology. Such areas as these may in most respects at the present time be treated in the same manner as open seas.

There are, however, smaller gulfs and bays as to the jurisdiction of which there are controversies. When the mouth of the gulf or bay is not more than 6 miles wide, the jurisdiction is admittedly within the adjacent state or states. If one state is sovereign over all the coast of such a bay, its jurisdiction is exclusive.

In the North Atlantic fisheries arbitration the British contention was that the word "bays" in the treaty of 1818 meant "all those waters which, at the time, everyone knew as bays," while the United States maintained that it was confined "to coast indentations whose headlands are not more than 6 miles apart."

The United States has, however, maintained a wider limit for gulfs, from time to time, since the founding of the Republic. In 1793 an opinion of the Attorney General, in regard to the capture of the British ship *Grange* by the French frigate *L'Embuscade*, claimed "that the *Grange* was arrested in the Delaware, within the capes, before she had reached the sea," and that "to attack an enemy in a neutral territory is absolutely unlawful." The question then arises as to whether the attack within the Capes Henlopen and May was within neutral jurisdiction, and the question of jurisdiction on the sea was by specific statement excluded. In support of the claim that the bay was within the jurisdiction of the United States, the Attorney General, Edmund Randolph, further says of Delaware Bay:

It communicates with no foreign dominion; no foreign nation has ever before exacted a community of right in it, as if it were a main sea; under the former and present Governments the exclusive jurisdiction has been asserted; by the very first collection law of the United States, passed in 1789, the county of Cape May, which includes Cape May itself and all the waters thereof, heretofore within the jurisdiction of the State of New Jersey, are comprehended in the district of Bridgetown; the whole of the State of Delaware, reaching to Cape Henlopen, is made one district. Nay, unless these positions can be maintained, the Bay of Chesapeake, which, in the same law, is so fully assumed to be within the United States, and which, for the length of the Virginia territory, is subject to the process of several counties to any extent, will become a rendezvous to all the world, without any possible control from the United States. Nor will the evil stop here. It will require but another short link in the process of reasoning to disappropriate the mouths of some of our most important rivers.

Such a statement implies that neutral jurisdiction may be claimed in bays where the headlands are more than 6 miles apart. The demand for the restoration of the ship *Grange* was granted by France, thus giving a provisional recognition of the exclusive jurisdiction of the United States in the Delaware Bay.

A somewhat more definite provision in regard to the method of measurement of the line of jurisdiction was proposed in a letter of Secretary of State Madison, May 17, 1800, to Messrs. Monroe and Pinckney, who were representing the United States in London. Madison suggested that an article be negotiated as follows:

It is agreed that all armed vessels belonging to either of the parties engaged in war, shall be effectually restrained by positive orders, and penal provisions, from seizing, searching, or otherwise interrupting or disturbing vessels to whomsoever belonging, whether outward or inward bound, within the harbours or the chambers formed by headlands, or anywhere at sea, within the distance of four leagues from the shore, or from a right line from one headland to another; it is further agreed, that, by like orders and provisions, all armed vessels shall be effectually restrained by the party to which they respectively belong, from stationing themselves, or from roving or hovering so near the entry of any of the harbours or coasts of the other, as that merchantmen shall apprehend their passage to be unsafe, or in danger of being set upon and surprised; and that in all cases where death shall be

occasioned by any proceeding contrary to these stipulations, and the offender cannot conveniently be brought to trial and punishment under the laws of the party offended, he shall, on demand made within _____ months, be delivered up for that purpose.

If the distance of four leagues cannot be obtained, any distance not less than one sea league may be substituted in the article. It will occur to you that the stipulation against the roving and hovering of armed ships on our coasts so as to endanger or alarm trading vessels, will acquire importance as the space entitled to immunity shall be narrowed.

The discussion in regard to this matter led to the drawing up of a convention which named 5 marine miles as the limit of maritime jurisdiction, but this convention was never ratified.

There was a long period of discussion over what constituted a bay, particularly in the claims as to fishing rights.

Headland doctrine.—The Netherlands declared in the neutrality proclamation during the Russo-Japanese war of 1904–5 for the 10-mile limit of bays:

ART. VIII. Under the territory of the Kingdom is also included the seacoast to within a distance of 3 nautical miles of 60 degrees latitude at low-water mark. In regard to bays, that distance of 3 nautical miles shall be measured from a straight line athwart the bay as close as possible to the entrance at the first point at which the entrance to the bay exceeds 10 miles of 60 degrees latitude. (Foreign Relations U. S., 1904, p. 27.)

North Atlantic coast fisheries arbitration, 1909.—Question 5, submitted to arbitration at The Hague in the contention between the United States and Great Britain in regard to the North Atlantic coast fisheries under the treaty of 1818, raised the following point:

From where must be measured the "three marine miles of any of the coasts, bays, creeks, or harbours" referred to in the said article?

The British contention in regard to bays was summarized in the British case, as follows, in a statement as to "Rights over inclosed waters:"

It is also undoubted law that a state can exercise sovereignty over certain portions of the sea inclosed within its territory by headlands or promontories.

But different considerations apply in the case of inclosed waters from those which affect the open sea. The possession of headlands gives a greater power of control over waters contained within them than there can be over the open sea, and the safety of a state necessitates more extended dominion over the bays and gulfs inclosed by its territories than over open waters. Moreover, the interest of other nations in bays and gulfs is not so direct if, as is commonly the case, they lie off the ocean highways. For these reasons the 3-mile rule has never been applied to inclosed waters, nor has any defined limit been generally accepted in regard to them. It is true that the understanding of nations has imposed some restrictions on the exercise of sovereignty over these waters, and that states do not now assert claims, such as were common in former times, over waters which from their size or configuration can not be effectively controlled or which from their situation can not be fairly held to be the exclusive property of any one state. But these restrictions must depend on the particular circumstances of each case; they have never become formulated in any rule of general application. There was therefore no definite meaning which could have been assigned in 1818 to the term "bays in His Majesty's dominions" unless it were the meaning which His Majesty's Government contends should be put upon it; and there was no principle of the law of nations under which the meaning could be limited to bays of a certain extent only. (North Atlantic Coast Fisheries Arbitration, British Case, p, 108, Vol. IV, U. S. Sen. Doc. 870, 61st Cong., 3d sess., p. 96.)

Attempts have been made, it is true, by some writers to suggest a general principle capable of application to all inclosed waters. But these suggestions have led to no practical result. The difference in the considerations which affect particular cases has made it difficult, if not impossible, to formulate any general rule, and the difference in the considerations which affect the open sea on the one hand and inclosed waters on the other hand has made it impossible to apply the same general rule to both.

It is submitted, therefore, that the opinions of jurists establish that there is not any definite limit, whether 6 miles miles or more, beyond which inclosed waters, such as bays, may not be claimed as territorial waters by the state within whose shores they are inclosed, and that a fortiori there was no such limit in 1818. It follows that the word "bay" as used in the treaty was used in its ordinary sense and included all those tracts of water known at the time as bays. (North Atlantic Coast Fisheries, British Case, p. 121, Vol. IV, U. S. Sen. Doc. 870, 61st Cong., 3d sess, p. 108.)

American contention, 1909.—The contention of the United States in the North Atlantic coast fisheries arbitration was to restrict, under the treaty of 1818, the

opening of bays to the 6-mile limit. The conclusion was stated as follows:

5. The position of the United States with reference to question 5 is that the distance of "3 marine miles of any of the coasts, bays, creeks, or harbors" referred to in the said article, must be measured from low-water mark, following the indentations of the coast; and the United States requests the tribunal to answer and decide this question accordingly. (Case of the United States, Ibid., vol. 1, p. 248.)

Opinion of Dr. Drago.—Dr. Drago, in a dissenting opinion, refers to the award which states that the line from which the 3-mile limit shall extend shall be drawn "across the body of water at the place where it ceases to have the configuration characteristic of a bay. At all other places the 3 miles are to be measured following the sinuosities of the coast." In criticizing this, he justly says:

But no rule is laid out or general principle evolved for the parties to know what the nature of such configuration is or by what methods the points should be ascertained from which the bay should lose the characteristics of such. (Ibid., vol. 1, pp. 102–112.)

Chesapeake Bay.—In the case of the Alleganean, considered by the Alabama Claims Commission, it was said (Stetson *v.* The United States) of the Chesapeake Bay:

Considering, therefore, the importance of the question, the configuration of Chesapeake Bay, the fact that its headlands are well marked and but 12 miles apart; that it and its tributaries are wholly within our own territory; that the boundary lines of adjacent States encompass it, that from the earliest history of the country it has been claimed to be territorial waters and that the claim has never been questioned; that it can not become the pathway from one nation to another; and remembering the doctrines of the recognized authorities upon international law, as well as the holdings of the English courts as to the Bristol Channel and Conception Bay, and bearing in mind the matter of the brig *Grange* and the position taken by the Government as to Delaware Bay, we are forced to the conclusion that Chesapeake Bay must be held to be wholly within the territorial jurisdiction and authority of the Government of the United States and no part of the "high seas" within the meaning of the term as used in section 5 of the act of June 5, 1872. (Moore, International Arbitrations, Vol. IV, p. 4341.)

Opinion of Azuni.—Azuni, whose work had great authority in the early nineteenth century, showed clearly the opinion at that time:

It is already established among polished nations that in places where the land by its curve forms a bay or a gulf we must suppose a line to be drawn from one point of the inclosing land to the other or along the small islands which extend beyond the headlands of the bay, and that the whole of this bay or gulf is to be considered as territorial sea, even though the center may be in some places at a greater distince than 3 miles from either shore. (Maritime Law of Europe, ed. 1806, vol. 1, p. 206.)

This opinion of Azuni was an expression of the ideas which had been developing since the conception of any limits had arisen, generally following Grotius and Bynkershoek, to the effect that a state should have jurisdiction over such bodies of water, because it could exercise dominion over them from the shore.

> Far as the s vereign can defend his sway,
> Extends his empire o'er the wat'ry way;
> The shot sent thundering to the liquid plain
> Assigns the limits of his just domain.
> —(*Azuni*, Maritime Law, vol. 1, p. 194.)

Opinion of Prof. Westlake.—Prof. Westlake, who died in 1913, one of the leading English authorities, said:

As to bays, if the entrance to one of them is not more than twice the width of the littoral sea enjoyed by the country in question—that is, not more than 6 sea miles in the ordinary case, 8 in that of Norway, etc.—there is no access from the open sea to the bay except through the territorial water of that country, and the inner part of the bay will belong to that country, no matter how widely it may expand. The line drawn from shore to shore at the part where, in approaching from the open sea, the width first contracts to that mentioned, will take the place of the line of low water, and the littoral sea belonging to the state will be measured outward from that line to the distance, 3 miles or more, proper to the state. But although this is the general rule, it often meets with an exception in the case of bays which penetrate deep into the land and are called gulfs. Many of these are recognized by immemorial usage as territorial sea of the states into which they penetrate, notwithstanding that their entrance is wider than the general rule for bays would give as a limit to such appropriation. Examples are the Bay of Conception in Newfoundland, penetrating 40 miles into the land and being 15 miles in average breadth, which is wholly British;

Chesapeake and Delaware Bays, which belong to the United States; and the Bay of Cancale, 17 miles wide, which belongs to France. Similar exceptions to those admitted for gulfs were formerly claimed for many comparatively shallow bays of great width—for example, those on the coast of England from Orfordness to the North Foreland and from Beachy Head to Dunnose, which, together with the whole of the Bristol Channel and various other stretches of sea bordering on the British Isles, were claimed under the name of the King's Chambers. But it is only in the case of a true gulf that the possibility of occupation can be so real as to furnish a valid ground for the assumption of sovereignty, and even in that case the geographical features which many warrant the assumption are too incapable of exact definition to allow of the claim being brought to any other test than that of accepted usage. It is sometimes said and may be historically true that all sovereignty now enjoyed over the littoral sea or certain gulfs is the remnant of the vast claims which, as we have seen, were once made to sovereignty over the open sea, and which it is held have been gradually reduced to a tolerable measure through such intermediate stages as that of the King's Chambers; and the impossibility of putting the claim to gulfs in a definite general form may be thought favorable to that view. None the less, however, the rights which are now admitted stand on a basis clear and solid enough to distinguish and support them. (International Law, Vol. I, p. 187.)

Institute of International Law, 1894.—At the session of the Institute of International Law in 1894, the reporter of the commission having in charge the matter of regulations for maritime jurisdiction favored a 10-mile limit for distance between headlands of closed bays. The institute, however, by a large vote adopted 12 miles as the proposed limit, the argument being that if 6 miles was the limit for marginal sea, that logically twice this distance would be the proper limit between headlands of bays.

The proposed regulation of 1894 took the following form:

ART. 3. Pour les baies, la mer territoriale suit les sinuosités de la côte, sauf qu'elle est mesurée à partir d'une ligne droite tirée en travers de la baie dans la partie la plus rapprochée de l'ouverture vers la mer, où l'écart entre les deux côtes de la baie est de douze milles marins de largeur, à moins qu'un usage continu et séculaire n'ait consacré une largeur plus grande. (XIII Annuaire, 1894–5, p. 329.)

It was clear that there was no consensus of opinion upon the subject in 1894, either among authors or among the governmental officials.

Roadstead.—The idea of a roadstead seems to have been clear, even in early times. It was well understood in the early part of the nineteenth century:

> Quand l'ordonnance parle de rade, elle entend parler de tous les lieux d'ancrage qui sont à quelque distance de la côte où les vaisseaux trouvent fond, pour pouvoir y demeurer à l'ancrage; et où ils mouillent ordinairement, en attendant le vent ou la marée, pour entrer dans le port, ou pour faire voile; la rade, comme dit la loi 1, § 13, ff., de fluminibus, est locus minimè portuosus, sed in quo naves in salo esse et commorari queunt. Mais on doit observer les formalités prescrites à ce sujet, tant aux Français qu'aux étrangers: de sorte que s'ils y manquoient, ils ne pourroient pas se plaindre des poursuites qui pourroient être faites contre eux, comme d'un trouble et d'un empêchement. (Boucher, Institution au droit maritime, 1803, p. 707.)

Straits.—The extension of maritime jurisdiction to 6 or more miles would have a decided bearing upon the jurisdiction over straits. Some of the most important straits of the world are not twice 6 miles wide, but are more than twice 3 miles wide. It is recognized that straits not more than twice 3 miles in width are under the jurisdiction of the adjacent states, but that free passage between open seas may not be impaired under ordinary circumstances. In time of war it may be doubted whether a state if under stress may not temporarily bar a strait not more than 6 miles wide if it has jurisdiction of both shores. If the limit is extended to 12 miles the conditions are changed in a ratio which does not seem similar to that in case of extension of jurisdiction in the open sea. For this reason some who have favored extension of marginal sea jurisdiction have not favored it for straits. A strait is, however, an extension of the sea in most instances and no plan seems to have been suggested for determining when the marginal sea jurisdiction shall be reduced to the limits of the proposed jurisdiction for straits.

Straits connecting open seas.—As in claims of jurisdiction over the marginal sea, so in claims of jurisdiction

over straits, there has been a relaxation of extreme pretensions. The English claim to exclusive jurisdiction over the North, Bristol, and St. Georges Channels would probably no longer be maintained. While claims to exclusive jurisdiction over wide channels and straits were gradually waived or allowed to lapse, claims over narrow straits were maintained.

Straits which connected open seas, even though narrow, were gradually opened, and a general right of innocent passage was recognized. One of the longest controversies was in regard to the passage of the Danish Sounds. The so-called "sound dues" were levied for many years upon vessels passing through these waters. The United States maintained that such a tax upon passage between open seas was contrary to the principles of freedom of navigation. The powers of Europe were opposed to the continued payment of such a tax, and finally an indemnity was paid to Denmark, in 1857, for relinquishing its claim to collect these dues. The United States, not recognizing the right of Denmark, made a treaty in 1858 by which, in consideration of the payment of a lump sum, the Sounds and Belts should be made free to American vessels, and the means of convenient navigation should be maintained at the cost of Denmark. The United States had maintained the contention of many writers that the freedom of the sea would be a fiction if the passage between the different seas was closed.

Strait of Magellan.—In a letter of the American minister to Argentine to the Secretary of State of June 12, 1879, it was stated that a convention was pending which provided that "the Strait of Magellan is to be considered neutral and open to the flags of all nations, and neither Government is to exercise jurisdiction in its waters, which are to be considered an open or free sea." (Foreign Relations U. S., 1879, p. 23.)

The treaty of July 23, 1881, between the Argentine Republic and Chile, in article 5 provided:

> The Strait of Magellan is neutralized, and free navigation thereon insured to the flags of all nations. With a view to guaranteeing

this freedom and neutrality, no fortification or military defenses will be raised that may clash with that object. (Foreign Relations U. S., 1881, p. 12.)

The United States had, in 1879, said that the Strait of Magellan could not be claimed as under the exclusive control of any state or states.

Straits connecting with inland waters.—The idea that restrictions could be placed upon straits which led to closed seas has received considerable support, both in theory and practice.

The Bosphorus and Dardanelles were regarded as under the sole control of Turkey as long as Turkey held control of all of the Black Sea. After Russia obtained a footing on the Black Sea freedom of passage was granted by treaty to merchant vessels. However, in the convention of 1841 the European powers recognized the right of Turkey to exclude ships of war. The same principle was included in the treaties of 1856 and 1871. The United States has never admitted the binding force of this provision, though always asking permission to pass. Questions were raised when, in 1902, Russian torpedo destroyers passed through on condition that they be transformed and placed under the commercial flag, and again, in 1904, at the time of the Russo-Japanese War, when under the commercial flag vessels of the volunteer fleet passed through and were subsequently transformed into ships of war.

Such examples show the nature of the questions which may arise.

Extent of jurisdiction.—It would be admitted that a strait not wider than 6 miles would be under the jurisdiction of the adjacent state or states. According to circumstances, in absence of conventional agreement, if two or more states had territory along the shores the jurisdiction would be to the middle of the strait or to the middle of the navigable channel, but innocent passage could not be denied between open seas.

The claims for jurisdiction over straits more than 6 miles wide have been variously supported. The range

of cannon shot has been the common basis of measurement and for straits has naturally been reckoned from each shore. Just what area would thus be covered by twice the range of cannon shot has not been determined. An arbitrary limit of 10 miles width for straits which should be under the control of the coast states has often been proposed. The Institute of International Law proposed 12 miles. Certain writers have suggested 24 miles.

An extension beyond 6 miles necessarily carries with it the obligations to submit to jurisdiction which may not have been exercised in certain areas up to the present time.

When it is considered that such straits as Gibraltar, Bab el Mandeb, and others might be under coast jurisdiction if the limits are much extended beyond 6 miles, it is evident that there may be objections. Of course, war-like operations must not be carried on within neutral jurisdiction, and an increase in neutral jurisdiction is a decrease in area for war-like operations in that region.

Institute of International Law, 1894.—The Institute of International Law, in 1894, gave attention to the subject of straits in considering maritime jurisdiction. After prescribing rules for the use of territorial waters in general, the institute, after discussion, continues:

ART. 10. Les dispositions des articles précédents s'appliquent aux détroits dont l'écart n'excède pas douze milles, sauf les modifications et distinctions suivantes:

1° Les détroits dont les côtes appartiennent à des États, différents font partie de la mer territoriale des États riverains, qui y exerceront leur souveraineté jusqu'à la ligne médiane.

2° Les détroits dont les côtes appartiennent au même État et qui sont indispensables aux communications maritimes entre deux ou plusieurs États autres que l'État riverain font toujours partie de la mer territoriale du riverain, quel que soit le rapprochement des côtes.

3° Les détroits qui servent de passage d'une mer libre à une autre mer libre ne peuvent jamais être fermés.

ART. 11. Le régime des détroits actuellement soumis à des conventions ou usages spéciaux demeure réserve. (Annuaire, vol. 13, p. 330.)

This extent is, however, greater than that accepted even at the present time.

The International Law Association in 1895 proposed that straits mentioned under the second paragraph should never be closed, and also as a new regulation—

Dans les détroits dont les côtes appartiennent au même État, la mer est territoriale bien que l'écartement des côtes dépasse douze milles, si à chaque entrée du détroit cette distance n'est pas dépassée.

These same modifications were proposed by Sir Thomas Barclay to the Institute of International Law in 1912.

The idea of various regulations seems to be to make a distinction between straits connecting what may be called open seas and those connecting seas wholly within the jurisdiction of a single state or a sea not regarded as generally open to the ships of the world.

Innocent passage.—As the adjacent state has jurisdiction over its marginal sea according to the above discussion, the general principle has been developed that "belligerents are bound to respect the sovereign rights of neutral powers and to abstain, in neutral territory or neutral waters, from all acts which would constitute, on the part of the neutral powers which knowingly permitted them, a nonfulfillment of their neutrality." (Hague Convention, Rights and Duties of Neutral Powers in Maritime War, Art. I.)

On the other side, "the neutrality of a power is not affected by the mere passage through its territorial waters of ships of war or prizes belonging to belligerents." Also a certain number of belligerent ships of war may be permitted to remain for a specified period within neutral waters, and to take on provisions or fuel and to make certain repairs.

Summary.—While there may be arguments for different regulations for gulfs, bays, straits, roadsteads, etc., it is difficult to adjust these so as to reconcile the principles of maritime jurisdiction unless the same limits as for marginal seas are assumed. Accordingly, if a limit of 6 miles is accepted for marginal seas, the same should be used for other waters.

Conclusion.—*b* (1) (a) The limits of gulfs or bays shall be the line where the distance between the opposite shores of the entrance to the waters first narrows to 12 miles and the marginal sea extends 6 miles from this line. (b) Roadsteads according to their situation are regarded as subject to jurisdiction corresponding to that over marginal sea or over gulfs and bays. (c) Straits, when not more than 12 miles in width, are under the jurisdiction of the adjacent state or states.

Canals.—Canals may be national, constructed purely for national purposes and within national jurisdiction. The canal connecting the waters of Lake Michigan with the Mississippi River would unquestionably be such a canal. Some of the other canals along the Great Lakes have a mixed character. The Suez Canal is regarded as international.

General.—It is admitted that there are routes along which commerce between certain points would pass if left free. The diversion of commerce to other routes would be an additional burden to those engaged in such enterprises.

There are also certain routes which have been or are closed to commerce by natural obstructions. If these obstructions are removed and commerce is allowed to follow a direct route, it will tend to take such a course.

Sometimes on land the obstruction may be a river, a mountain, a valley, or other obstruction. If the river or valley is bridged or the mountain is tunneled, the party performing this service is usually recompensed by the privilege of regulating the use of the means by which the new route has been made possible.

Sometimes the obstruction to maritime commerce may be a shallow channel, a rock, or the entire absence of a waterway. If the channel is deepened or if the rock is removed it often happens that the cost of such work is recompensed by charges upon commerce using such routes.

If a waterway is made where previously none existed, the use of such a route is usually under control of the party which bears the cost of the construction.

When the general principles and conditions under which an artificial waterway may be used have been established, and the use of the waterway under these conditions has become customary, there is reason for protest if sudden or unjust restrictions are placed upon the future use. Contracts may have been made based upon the expectation of the continuation of the status quo. Boats of special design or for the special service may have been constructed, etc. Conditions should not therefore be suddenly changed.

Interparliamentary Union, 1913.—A set of rules upon the subject of the regulation of the use of canals is contained in a report of the committee of the Interparliamentary Union, approved March 18, 1913. It was as follows:

CONCLUSIONS DU RAPPORT DE LA COMMISSION DES DETROITS ET DES CANAUX.

L'application du régime intégral des conventions du 23 juillet 1881 pour le détroit de Magellan, du 29 octobre 1888 pour le canal de Suez, et du 18 novembre 1901 pour le canal de Panama, à tous les détroits et canaux interocéaniques présente trop de difficultés pour qu'on puisse d'ores et déjà la prôner comme une solution possible.

II. Il y a pourtant certains principes dans ce domaine qu'on peut considérer comme étant susceptibles d'être adoptés dès à présent par la généralité des États civilisés dans l'intérêt des communications internationales et de la paix mondiale.

Ces principes seraient:

(*a*) La reconnaissance expresse du droit de libre passage des navires de commerce sans distinction de pavillon en temps de paix et de guerre dans tous les détroits reliant deux mers non intérieures et dans les canaux interocéaniques proprement dits;

(*b*) La stricte prohibition du blocus de ces détroits et canaux;

(*c*) L'interdiction de placer des mines ou des torpilles pouvant barrer totalement le passage de ces détroits et canaux et l'obligation de donner avis à la navigation quant au placement des mines et des torpilles dans les eaux territoriales avoisinantes;

(*d*) L'interdiction d'éteindre, même en temps de guerre, les phares qui balisent le passage de ces détroits et canaux;

(*e*) La reconnaissance dans les traités sur les détroits et canaux, de l'emploi de l'arbitrage, ou d'autres moyens amiables ou judiciaires, pour la solution des litiges relatifs à l'application ou à l'interprétation de ces traités.

Les moyens d'obtenir la consécration de ces principes par le droit international conventionnel doivent être soigneusement étudiés au point de vue de l'action de l'Union interparlementaire.

III. Certains cas particuliers, qui par leur caractère exceptionnel constituent un sérieux empêchement à l'adoption de règles générales plus complètes, ont besoin, par leur complexité, d'une étude plus longue et de nouvelles discussions.

La coopération des groupes nationaux dans l'étude de ces questions servira beaucoup à les éclairer et aidera puissamment la Commission.

Opinion of Prof. Holland.—Prof. Holland, of Oxford University, writing of the international position of the Suez Canal, and referring to canals in general, said:

In time of peace the territorial power is, according to modern usage, obliged to allow "innocent passage," under reasonable conditions as to tolls and the like, to the vessels of other powers. Whether the passage of ships of war would be "innocent" is a question of some doubt, but should probably be answered in the affirmative.

In time of war the territorial power, if belligerent, may of course deal with the ships of the enemy as it pleases. It will endeavor to capture them, be they public or private, within the straits as elsewhere. The enemy will similarly exercise his belligerent rights within the straits as well as outside of them. Should the territorial power be neutral, the channel, as neutral territorial water, will probably be open, as in time of peace, for the innocent passage of all ships, public as well as private, although it has been suggested that the territorial power, if neutral, might be called upon, as such, by either belligerent to close the channel to the warships of the other. The straits will be, of course, closed to belligerent operations, the occurrence of which within them the territorial power is not only entitled, but obliged, to prevent. (Studies in International Law, p., 278.)

These words are from a lecture delivered in 1883, but Prof. Holland had apparently found no reason to modify these statements when the lecture was added to and published in 1898.

The Suez Canal was, according to Article I of the convention of 1888, to be free and open:

The Suez Maritime Canal shall always be free and open, in time of war as in time of peace, to every vessel of commerce or of war, without distinction of flag.

Consequently, the high contracting parties agree not in any way to interfere with the free use of the canal, in time of war as in time of peace.

The canal shall never be subjected to the exercise of the right of blockade.

Great Britain made a reservation which caused the convention to be regarded as not in "practical operation" as regards Great Britain till April 8, 1904, by the declaration of Great Britain and France respecting Egypt and Morocco.

Suez and Panama Canal.—By many the Suez and Panama Canals are regarded as in a class by themselves. The reason for this is that they unite great bodies of water in such manner as to materially change the course of the commerce of the world, and in such manner as to create a dependence upon their use similar to that of the open sea. Some have used the argument that so far as these canals are filled with the waters of the sea, the rights of other states in the open sea flow in with the waters. This argument can easily be shown to have little weight. The fact is that the areas through which these two great canals pass are practically under the jurisdiction of the two great English-speaking states, and the jurisdiction of the states earlier in nominal control of these areas is at an end. The regulation of the use of these canals has, therefore, become the subject of conventional agreement.

In a general way the attitude of the United States toward the Panama Canal seems to have changed from time to time and may be divided into three periods. During the period of the nineteenth century before 1850 the idea of internationalization of the canal was common. From 1850 to 1880 the doctrine of neutralization received approval. Since 1880 there has been a growing sentiment in favor of nationalization. In certain respects there are similarities between the Panama and Suez Canals.

The Suez Canal is an artificial waterway, the use of which has been regulated by conventional agreement to which a considerable number of states are parties, and the United States is not of this number. The use of the

Panama Canal is regulated by an agreement to which the United States and Great Britain are parties and to which other states are not parties.

In other respects there are many and striking parallels in the physical and historical aspects of the two waterways. These have often been pointed out and have received much discussion. Both canals are practically under control of English-speaking powers; they are within the area of comparatively weak states; they have been constructed by foreign enterprise and capital; they are of great stragetic importance; they have great importance for the world commerce; they both form means of communication with great seas and shorten by many miles the route between these seas.

The conventional rules for the regulation of the use of the two waterways are also similar in many respects.

Conclusion.—1. (a) Canals or artificial waterways within neutral jurisdiction are closed or open to vessels of war during hostilities according to the regulations which have been established prior to the declaration of war. (b) No act of hostility shall take place within these waters.

2. (a) Canals or artificial waterways within belligerent jurisdiction when national in character may be closed during war, but should if possible be open to innocent vessels of neutral powers. (b) Canals or artificial waterways of mixed character which are not of grand importance to the commerce of the world may be similarly closed. (c) Canals or artificial waterways which are strictly international and form main highways of world commerce may be closed to all vessels of a power at war with the power which in time of peace is in control of the canal or artificial waterway.

General conclusion.—It is evident that there is wide diversity in the ideas as to maritime jurisdiction. This diversity had led to an increasing number of complications in recent years because of the development of closer international relations and the more general use of the area under maritime jurisdiction. The ancient rules do

not seem adapted to modern conditions. The policies and practices of the leading maritime states have often been inconsistent. The maritime states are beginning to seek for a sound basis for exercise of jurisdiction over neighboring waters. This basis may be limited in some degree by the changing range of cannon, but ultimately must have a more substantial basis in the reciprocal well being of the shore state and of the states which use the waters. This latter idea has more and more entered into the recent propositions in regard to defining maritime jurisdiction. While belligerents have rights upon the open sea and in their own waters, these rights are conditioned by the rights of neutrals, and the reverse may be equally true. It is necessary that regulations recognize this reciprocity of rights as well as the practice and precedents. The following regulations seem to embody the broad principles coming to be generally recognized in regard to maritime jurisdiction in time of war.

REGULATIONS.

1. Acts of war are prohibited in neutral waters and in waters neutralized by convention.

2. "Belligerents are bound to respect the sovereign rights of neutral powers and to abstain in neutral waters from all acts which would constitute, on the part of the neutral powers which knowingly permitted by them, a nonfulfillment of their neutrality."

3. The area of maritime war:

(*a*) The sea outside of neutral jurisdiction.

(*b*) Gulfs, bays, roadsteads, ports, and other waters of the belligerents.

4. Limitations:

(*a*) Marginal sea.—The jurisdiction of an adjacent state over the marginal sea extends to 6 miles (60 to a degree of latitude) from the low-water mark.

(*b*) Roadsteads.—The jurisdiction over roadsteads is the same as over the sea.

(*c*) Gulfs and bays.—The jurisdiction of an adjacent state over the sea extends outward 6 miles from a line

drawn between the opposite shores of the entrance to the waters of gulfs or bays where the distance first narrows to 12 miles.

(*d*) Straits.—(1) Straits not more than 12 miles in width are under the jurisdiction of the adjacent states. (2) Innocent passage through straits connecting upon seas is permitted.

(*e*) Canals.—(1) (*a*) Canals or artificial waterways within neutral jurisdiction are closed or open to vessels of war during hostilities according to the regulations which have been established prior to the declaration of war. (*b*) No act of hostility shall take place within these waters. (2) (*a*) Canals or artificial waterways within belligerent jurisdiction when national in character may be closed during war, but should if possible be open to innocent vessels of neutral powers. (*b*) Canals or artificial waterways of mixed character which are not of grand importance to the commerce of the world may be similarly closed. (*c*) Canals or artificial waterways which are strictly international and form main highways of world commerce may be closed to all vessels of a power at war with the power which in time of peace is in control of the canal or artificial waterway.

Topic II.

COMMENCEMENT OF HOSTILITIES.

What regulations should be made in regard to the commencement of hostilities?

REGULATIONS.

Article 1. Hostilities between the contracting powers must not commence without previous and explicit warning, in the form either of a reasoned declaration of war or of an ultimatum with conditional declaration of war.

Art. 2. The state of war must be notified to the neutral powers without delay, and shall not take effect in regard to them until after the receipt of a notification, which may even be given by telegraph. Neutral powers, nevertheless, can not plead the absence of notification if it is established beyond doubt that they were in fact aware of the state of war.

Art. 3. Article 1 of the present convention shall take effect in case of war between two or more of the contracting powers. Article 2 is binding as between a belligerent power which is a party to the convention and neutral powers which are also parties to the convention.

NOTES.

Introduction.—Certain aspects of the subject of declaration of war were considered in the International Law Situations of this Naval War College in the conference of 1910, and appear in the publication of that year as Situation II, pages 45 to 65. It was then shown that no uniformity of practice had prevailed in regard to time, method, or form of declaration, that there were reasons why some regulation should prevail for the declaration, and that The Hague conference of 1907 had tried to meet this need in the convention relative to the opening of hostilities.

Hague convention 1907, opening of hostilities.—The Hague conference of 1907 considered the question of the opening of hostilities, both from the point of view of the belligerent and of the neutral. The result of the long and careful discussion was a convention, of which the following are the essential articles:

ARTICLE 1. The contracting powers recognize that hostilities between themselves must not commence without previous and explicit warning, in the form either of a declaration of war, giving reasons, or of an ultimatum, with a conditional declaration of war.

This convention has now been adopted by most of the larger states of the world.

The understanding of its significance as presented to the Secretary of State by the American delegates is shown in the following statement from their official report:

The convention is very short, and is based upon the principle that neither belligerent should be taken by surprise, and that the neutral shall not be bound to the performance of neutral duties until it has received notification, even if only by telegram, of the outbreak of war. The means of notification is considered unimportant, for if the neutral knows, through whatever means or whatever channels, of the existence of war, it can not claim a formal notification from the belligerents before being taxed with neutral obligations. While the importance of the convention to prospective belligerents may be open to doubt, it is clear that it does safeguard in a very high degree the rights of neutrals, and specifies authoritatively the exact moment when the duty of neutrality begins. It is for this reason that the American delegation supported the project and signed the convention. (60th Cong., 1st sess., S. Doc. 444, p. 34.)

It is to be observed that this convention establishes the principle that the declaration shall be previous to the opening of hostilities, but does not state how long before the opening of hostilities the declaration should be made. The propositions made for fixing a specified time between the declaration of war and the opening of hostilities did not receive sufficient support in the conference to secure adoption. The committee concerned particularly with the formulation of the rules for the opening of hostilities called attention to the fact that the Institute of International Law in 1906 had not been able to agree upon a

period for delay between declaration and opening of hostilities, even when sitting in an unofficial capacity. The essential point is that the declaration shall be previous to the opening of hostilities.

Recent declarations.—Recent declarations of war show the necessity for definite regulations. The date of the commencement of the Spanish-American War of 1898 gave rise to many questions, some of which were taken to the Supreme Court of the United States.

Spanish-American War declaration, April 25, 1898.—According to the Constitution of the United States (Art. I, sec. 8, n.) Congress has power "to declare war."

On April 19, 1898, Congress passed the following:

Joint resolution for the recognition of the independence of the people of Cuba, demanding that the Government of Spain relinquish its authority and government in the island of Cuba, and to withdraw its land and naval forces from Cuba and Cuban waters, and directing the President of the United States to use the land and naval forces of the United States to carry these resolutions into effect.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, First, That the people of the island of Cuba are, and of right ought to be, free and independent.

Second. That it is the duty of the United States to demand, and the Government of the United States does hereby demand, that the Government of Spain at once relinquish its authority and government in the island of Cuba and withdraw its land and naval forces from Cuba and Cuban waters.

Third. That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several States, to such extent as may be necessary to carry these resolutions into effect.

Fourth. That the United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction, or control over said island except for the pacification thereof, and asserts its determination, when that is accomplished, to leave the government and control of the island to its people.

Approved April 20, 1898. (Foreign Relations U. S., 1898, p. 765.)

This resolution was immediately dispatched to the American minister to Spain, with an ultimatum.

Mr. Sherman to Mr. Woodford.

[Telegram.]

DEPARTMENT OF STATE,
Washington, April 20, 1898.

You have been furnished with the text of a joint resolution voted by the Congress of the United States on the 19th instant (approved to-day) in relation to the pacification of the island of Cuba. In obedience to that act, the President directs you to immediately communicate to the Government of Spain said resolution, with the formal demand of the Government of the United States that the Government of Spain at once relinquish its authority and government in the island of Cuba and Cuban waters. In taking this step the United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction, or control over said island except for the pacification thereof, and asserts its determination when that is accomplished to leave the government and control of the island to its people under such free and independent government as they may establish.

If, by the hour of noon on Saturday next, the 23rd day of April, instant, there be not communicated to this Government by that of Spain a full and satisfactory response to this demand and resolution, whereby the ends of peace in Cuba shall be assured, the President will proceed without further notice to use the power and authority enjoined and conferred upon him by the said joint resolution to such extent as may be necessary to carry the same into effect.

SHERMAN.

(Ibid, p. 764.)

Before Mr. Woodford had delivered the communication to the Spanish Government, the Spanish minister of state sent to Mr. Woodford the following note:

In compliance with a painful duty, I have the honor to inform your excellency that, the President having approved a resolution of both Chambers of the United States which, in denying the legitimate sovereignty of Spain and in threatening armed intervention in Cuba, is equivalent to an evident declaration of war, the Government of His Majesty has ordered its minister in Washington to withdraw without loss of time from the North American territory with all the personnel of the legation. By this act the diplomatic relations which previously existed between the two countries are broken off, all official communication between their respective representatives ceasing; and I hasten to communicate this to your excellency in order that on your part you may make such dispositions as seem suitable. (Ibid, p. 767.)

Mr. Woodford then (Apr. 21, 1898) requested his passports and withdrew from Spain.

Spain on April 21, 1898, at 7.30 a. m. had stated that the threat of intervention in Cuba "is equivalent to an evident declaration of war."

The Spanish minister at Washington had requested his passports on April 20 at about noon. Mr. Woodford had been instructed on April 20 to remain near the Spanish Court in his capacity of minister till noon of the 23d of April unless previously handed his passports; and he did remain, and diplomatic relations were continued till the morning of April 21.

A blockade of Cuban ports was proclaimed on April 22.

On April 23, 1898, the Queen Regent of Spain issued a decree announcing the existence of war and declaring the termination of the treaties "and all other agreements, compacts, and conventions that have been in force up to the present between the two countries."

On April 25, 1898, Congress, exercising its constitutional authority, passed the following act:

> First. That war be, and the same is hereby, declared to exist, and that war has existed since the twenty-first day of April, anno Domini eighteen hundred and ninety-eight, including said day, between the United States of America and the Kingdom of Spain.
>
> Second. That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several States, to such extent as may be necessary to carry this act into effect. (30 Stat., 364.)

By this act of April 25 war existed during the day of April 21 and from that time. By the Spanish decree treaty relations were superseded by war on April 23; in fact, diplomatic exchanges had taken place on April 21.

The Supreme Court of the United States acknowledged that war had existed since and including April 21, and that captures subsequent to that day were valid. This was two days prior to the Spanish decree and four days prior to the American declaration.

On the 25th of April President McKinley, recognizing that the position of the United States was not well de-

fined, said in a communication to Congress, referring to the position of the Spanish Government as stated in the note to the American minister at Madrid:

It will be perceived therefrom that the Government of Spain, having cognizance of the joint resolution of the United States Congress, and in view of the things which the President is thereby required and authorized to do, responds by treating the reasonable demands of this Government as measures of hostility, following with that instant and complete severance of relations by its action which by the usage of nations accompanies an existent state of war between sovereign powers.

The position of Spain being thus made known and the demands of the United States being denied with a complete rupture of intercourse by the act of Spain, I have been constrained, in exercise of the power and authority conferred upon me by the joint resolution aforesaid, to proclaim under date of April 22, 1898, a blockade of certain ports of the north coast of Cuba, lying between Cardenas and Bahia Honda and of the port of Cienfuegos on the south coast of Cuba; and further, in exercise of my constitutional powers and using the authority conferred upon me by the act of Congress approved April 22, 1898, to issue my proclamation, dated April 23, 1898, calling forth volunteers in order to carry into effect the said resolution of April 20, 1898. Copies of these proclamations are hereto appended.

In view of the measures so taken, and with a view to the adoption of such other measures as may be necessary to enable me to carry out the expressed will of the Congress of the United States in the premises, I now recommend to your honorable body the adoption of a joint resolution declaring that a state of war exists between the United States of America and the Kingdom of Spain, and I urge speedy action thereon, to the end that the definition of the international status of the United States as a belligerent power may be made known, and the assertion of all its rights and the maintenance of all its duties in the conduct of a public war may be assured. (Foreign Relations U. S., 1898, p. 771.)

From this it is plain that the status was not defined and assured until after the declaration, though the declaration issued on the 25th of April was held to define the status existing as regards the belligerent rights of the United States subsequent to the 20th of April. Under such conditions complications naturally arise not only as regards relations of belligerents but also as regards neutrals.

Under the provisions of The Hague convention there is required before commencement of hostilities a "pre-

vious and explicit warning, in the form either of a declaration of war giving reasons or of an ultimatum with a conditional declaration of war."

In 1898 Congress did not formally declare war until after the opening of hostilities, for a blockade was declared on April 22, 1898. This act of Congress was unquestionably legal under the Constitution of the United States, though it would not now be regarded as in accord with the convention relative to the opening of hostilities. Even if Congress had not declared war at all, it would certainly have existed after the Spanish decree of April 23. Whether without declaration war would have existed on April 21 is open to question. Whether the signing of the convention relative to the opening of hostilities has in any way limited the powers of Congress under the Constitution is a question that might be raised. However, as the United States has become a party to this convention, it is, as regards foreign states signatories to the convention, bound by its provisions. A failure to observe the provisions of the convention would render the United States liable.

Further, it is sufficient to say that in a change so far reaching in its effects as a change from state of peace to a state of war, it is only reasonable that the time of the change should be unequivocally known both to the opposing belligerent and to neutrals.

The ultimatum of the South African Republic, 1899.— At the time of the strained relations between the South African Republic and Great Britain, in 1899, the Republic issued an ultimatum showing that it regarded concentration of forces near its borders as an act of war. After relating many grounds for action, the ultimatum says:

> Her Majesty's unlawful intervention in the internal affairs of this Republic in conflict with the convention of London, 1884, caused by the extraordinary strengthening of troops in the neighborhood of the borders of this Republic, has thus caused an intolerable condition of things to arise whereto this Government feels itself obliged, in the interest not only of this Republic, but also of all South Africa, to make an end as soon as possible, and feels itself called upon and obliged to press earnestly and with

emphasis for an immediate termination of this state of things and to request Her Majesty's Government to give it the assurance—

(*a*) That all points of mutual difference shall be regulated by the friendly course of arbitration or by whatever amicable way may be agreed upon by this Government with Her Majesty's Government.

(*b*) That the troops on the borders of this Republic shall be instantly withdrawn.

(*c*) That all reinforcements of troops which have arrived in South Africa since the 1st June, 1899, shall be removed from South Africa within a reasonable time, to be agreed upon with this Government, and with a mutual assurance and guarantee on the part of this Government that no attack upon or hostilities against any portion of the possessions of the British Government shall be made by the Republic during further negotiations within a period of time to be subsequently agreed upon between the Governments, and this Government will, on compliance therewith, be prepared to withdraw the armed burghers of this Republic from the borders.

(*d*) That Her Majesty's troops which are now on the high seas shall not be landed in any port of South Africa.

This Government must press for an immediate and affirmative answer to these four questions, and earnestly requests Her Majesty's Government to return such an answer before or upon Wednesday, the 11th October, 1899, not later than 5 o'clock p. m., and it desires further to add that in the event of unexpectedly no satisfactory answer being received by it within that interval it will with great regret be compelled to regard the action of Her Majesty's Government as a formal declaration of war, and will not hold itself responsible for the consequences thereof, and that in the event of any further movements of troops taking place within the above-mentioned time in the nearer directions of our borders this Government will be compelled to regard that also as a formal declaration of war.

The reply of Great Britain was short and war was held to exist at once:

Her Majesty's Government have received with great regret the peremptory demands of the Government of the South African Republic conveyed in your telegram of 9th October, No. 3. You will inform the Government of the South African Republic, in reply, that the conditions demanded by the Government of the South African Republic are such as Her Majesty's Government deem it impossible to discuss.

Russo-Japanese War, 1904.—The Japanese declaration of war against Russia was published on February 10,

1904. The Russian reply was published on the same date. The *Ekaterinoslav* and *Mukden*, Russian steamships, were captured with their cargoes on February 6. Other steamships were captured on February 7. On February 8 the Japanese torpedo boats attacked the Russian fleet at Port Arthur. On the 9th other engagements took place and captures were made. Therefore the war was in full progress before any declaration was issued by either Japan or Russia. A decision of the Japanese court in the case of the *Ekaterinoslav* was to the effect that war existed from the time of the sailing of the Japanese fleet from Sasebo at 7 a. m. on February 6. Thus the Russo-Japanese war began about four days before the declaration was made, and it was legal war from that time. "The war commenced when the Japanese fleet left Sasebo with an intention of attacking the Russian fleet."

There was much discussion of these acts, and Russia entered a strong protest, and the Japanese Government replied. It is certain that it was not generally known that war had commenced when the fleet sailed on February 6, and it was not even known that the fleet had sailed. An element of uncertainty therefore existed.

Turco-Italian War, 1911.—It was announced in Rome late in September, 1911, that the Italian chargé d'affaires at Constantinople had been authorized to present an ultimatum to the Turkish Government, stating the grievances and demands of Italy. This communication was of the nature of an ultimatum with a conditional declaration of war. As both Italy and Turkey had participated in the conference at The Hague in 1907, these States were naturally familiar with the convention relative to the opening of hostilities. There was, therefore, an attempt on the part of Italy to conform to the provisions of the convention. This is shown in the ultimatum:

> During a long series of years the Government of Italy never ceased to make representations to the Porte upon the absolute necessity of correcting the state of disorder to which the Government of Turkey had abandoned Tripoli and Cyrene. These regions should be admitted to the benefits of the progress realized by other parts of the Mediterranean and Africa.

This transformation which is imposed by the general exigencies of civilization constitutes for Italy a vital interest of the first order by reason of the slight distance separating these countries from the coasts of Italy. Notwithstanding the attitude taken by the Government of Italy, which has always accorded its loyal support to the Imperial Government in the different political questions of recent times; notwithstanding the moderation and patience shown by the Government of Italy; its views concerning Tripoli have been badly received by the Imperial Government, but more than that, all enterprises on the part of Italians in the regions mentioned have been systematically opposed and unjustifiably crushed.

The Imperial Government, which to the present time has shown constant hostility toward all legitimate Italian activity in Tripoli and Cyrene, quite recently, at the eleventh hour, proposes to the Royal Government to come to an understanding, declaring itself disposed to grant any economic concession compatible with treaties in force and with the higher dignity and interests of Turks; but the Royal Government does not now feel itself in a position to enter such negotiations, the uselessness of which has been demonstrated by past experience and which far from constituting a guarantee for the future, would be themselves permanent causes of disagreement and conflict.

The Royal Government has received from its consular agents in Tripoli and Cyrene information that the situation is extremely grave because of the agitation prevailing against Italian subjects, and which is evidently incited by officers and other functionaries of authority.

This agitation constitutes an imminent danger, not only to Italian subjects, but to foreigners of all nationalities, which requires them, for their own security, to embark and leave Tripoli without delay.

The arrival at Tripoli of Ottoman military transports, which the Royal Government has not failed to observe, appears preliminary to serious events, aggravates the situation, and imposes on the Royal Government the obligation absolutely to prepare for the dangers which will result.

The Italian Government, having the intention henceforth to protect its interests and its dignity, has decided to proceed to the military occupation of Tripoli and Cyrene.

This solution is the only one that will give Italy power to itself decide and itself attend to that which the Imperial Government does not do.

The Royal Government demands that the Imperial Government shall give order that the actual Ottoman representative shall not oppose the measure which will, in consequence, be necessary to effect this solution without difficulty. An ultimate agreement will

be requested between the two Governments to regulate the definite siuation which will arise.

The royal embassy at Constantinople is ordered to demand a decisive response on this subject from the Ottoman Government within 24 hours of the presentation to the Porte of the present document, in default of which the Italian Government will consider itself as being obliged to proceed immediately with measures destined to assure the occupation. Ask, in addition, that the response of the Porte within the period of 24 hours shall be communicated also through Turkish embassy at Rome.

The reply of Turkey to the Italian ultimatum, though conciliatory, was not regarded by Italy as satisfactory.

The following is the text of the declaration handed to the Porte by the Italian embassy:

Carrying out the orders of the King, the chargé d'affaires of Italy has the honor to notify that the period accorded by the Royal Government to the Porte with a view to the realization of certain necessary measures has expired without a satisfactory reply reaching the Italian Government.

The lack of this reply only confirms the bad will or want of power of which the Turkish Government and authorities have given such frequent proof, especially with regard to the rights and interests of Italians in Tripoli and Cyrenaica.

The Royal Government is consequently obliged to attend itself to the safeguarding of its rights and interests as well as its honor and dignity by all means at its disposal.

The events which will follow can only be regarded as the necessary consequences of the conduct followed for so long by the Turkish authorities.

The relations of friendship and peace being therefore interrupted between the two countries, Italy considers herself from this moment in a state of war with Turkey.

The undersigned consequently has the honor to make known to your highness that passports will be placed at the disposal of the chargé d'affaires in Rome, and to beg your highness to hand him his own passports.

The Royal Government has likewise commissioned the undersigned to declare that Ottoman subjects may continue to reside in Italy without fear of an attack on their persons, property, or affairs.

DE MARTINO.

September 29, 1911.

As Italy considered a state of war as existing, a definite hour from which this should date was announced, viz, 2.30 p. m., September 29, 1911.

ROME, *September 29, 1911.*

It is officially announced that, the Ottoman Government having failed to meet the demands contained in the Italian ultimatum, Italy and Turkey "are in a state of war from half-past two in the afternoon of to-day, September 29."

The Italian Government will provide for the safety alike of Italians and foreigners of all nationalities in Tripoli and Cyrenaica by all means at its disposal.

A blockade of the entire coast of Tripoli and Cyrenaica will be immediately notified to the neutral powers.

Limitation of rules.—While the rules of the convention of 1907 make the previous and explicit declaration of war obligatory upon the contracting states, there are circumstances under which war may arise without declaration. Under such circumstances the early principles will prevail, and a subsequent declaration may determine when war legally begins or the beginning may be inferred from the first act of hostilities. When one of the parties to the war is not a party to The Hague convention such a condition might arise. In case of civil war the ordinary conditions would be such as to render a declaration if not unnecessary at least unusual. The early rules will therefore still be applicable to certain cases, even if those of 1907 are generally adopted.

Form of declaration of war as regards belligerents.—That war should not commence without a formal declaration was recognized practice among the ancients. In the Middle Ages three days' notice was sometimes required. Heralds were sent in advance ever after the days of Grotius, during the early part of the seventeenth century. From the beginning of the eighteenth century the practice was varied, by far the larger number of wars having been begun without previous declaration.

The recall of diplomatic agents has been the usual preliminary act of the government, indicating that relations are strained to such an extent that war may soon follow, but war does not necessarily follow, as the difference between the states may be adjusted. The nature of the diplomatic negotiations or of discussions in the parliaments may indicate that war is threatening, but none of these evidences constitutes a declaration of war.

An ultimatum may be issued containing a demand for satisfaction. Such an ultimatum is usually formulated in diplomatic terms, which would not make it too difficult for the state to which it is dispatched to find a way to adjust the difficulties. The ultimatum usually fixes the time within which an answer must be made. The United States required that Spain reply to its demand for withdrawal of Spanish forces from Cuba within three days; i. e., by April 23. War was declared on April 25. An ultimatum in itself does not necessarily involve a declaration of war unless the failure to comply with the demands carries with it a conditional declaration of war.

The British demands upon Venezuela in 1902 required an immediate satisfaction of certain claims, and concluded: "This communication must be regarded in the light of ultimatum." The failure of Venezuela to satisfy these claims did not lead to an immediate war, but to an attempt to establish a pacific blockade which subsequently took the form of a true blockade.

Whatever the preliminary negotiations or evidences of strained relations which might have received consideration prior to 1907, among those states now parties to the convention relative to the opening of hostilities, it is now necessary that there be a previous and explicit warning.

This previous and explicit warning may take the form of a reasoned declaration of war or of an ultimatum with a conditional declaration of war.

The reasoned declaration of war was regarded by many as necessary or at least very desirable because the opposing belligerent should be given a formal statement of the grounds of the war and the neutrals should not suffer such great changes in their ordinary rights and obligations without knowledge of the reasons.

If instead of the reasoned declaration of war, the ultimatum with conditional declaration was employed, the reasons for the breaking off of peaceful relations would be stated in the ultimatum.

The exact wording of the declaration or ultimatum would naturally vary according to circumstances, but

should be previous and explicit. That the beginning of a status which changes the legal and other relations of states and individuals and introduces risks and obligations where none had previously existed should be clearly defined scarcely needs argument. The possibility of injustice to innocent parties has been very great under the old system of uncertainty which prevailed under the doctrine that war commenced with the first act of hostility when there was no way of defining what constituted an act of hostility.

Col. Tinge, of the Chinese delegation at the Second Hague Conference, 1907, said that it would be serviceable to define the term war, for under the name of expeditions there had been numerous examples of invasions of his country.

Commencement of hostilities.—The Hague convention provides "the contracting powers recognize that hostilities between themselves must not commence without previous and explicit warning."

The discussions at The Hague in 1907 show that "previous" simply means before in time, but does not imply that any specified period of priority is involved.

There is in the convention no definition as to what constitutes the commencement of hostilities before which explicit warning must be given.

Dr. J. M. Spaight, writing in 1910, says:

> It is, of course, the aggressor who is bound to make the formal declaration of war. Every nation has the right to defend itself from attack. Continental jurists, while requiring a declaration from the belligerent who takes offensive action, admit that it is not required from the party repelling a hostile enterprise. Bluntschli adds that a defensive war may necessarily have, for military reasons, to take the form of offense. "From the point of view of law the difference between the offensive and defensive war lies not in the fact of being the first to cross the frontiers or invade the hostile territory, but in the difference of the respective rights of the parties." Hence he would dispense with a declaration where the threatened belligerent forestalls his adversary in self-defense. The doctrine is a dangerous one; aggressors are usually able to satisfy themselves that they are acting on the defensive. Bluntschli's view has no warranty in the convention of 1907. The

belligerent who strikes first, whether he is really acting on the defensive and his aggression is merely a tactical mode of self-protection or not, is bound to give notice, as laid down in the first article. (War Rights on Land, p. 24.)

A state whose frontier adjoined a state with which it had had or might have difficulties might double the number of troops along this frontier. It might assemble all its troops along this frontier. Would this be the commencement of hostilities? Would the other state be justified in regarding this as an act of war? If both states are parties to the convention and war follows, would the state placed at a disadvantage by the assembling of its opponent troops on the frontier have a right to maintain that the convention had been violated?

If the naval forces of a state had been similarly assembled in an advantageous position, would this be the commencement of hostilities? The assembling of the vessels may be of vastly more weight than the firing of guns in the determination of the issue if war arises.

Such being the case in regard to many acts on land and sea which may be in the nature of veiled threats, there always remains the right of the state against which the threat is directed to demand in an ultimation given reasons, the withdrawal of the threatening force, or even to demand that the forces be not assembled in such a manner as to be a threat. Of such action each state must be judge. There is nothing in the principles of international law which would forbid the placing of its troops in any part of its own territory or the movements of fleets in any direction on the seas.

As was shown in the International Law Situations in 1910, pages 45 to 65, there may be conditions under which the principles recognized previous to 1907 would prevail as in civil war, when the first act involving the use of military force may be regarded as the commencement of hostilities and the opening of war. In case of strained relations between states the performance or failure to perform an act specified in an ultimatum or in a conditional declaration of war may be regarded as the beginning of a state of war.

Form of declaration as regards neutrals.—The rule of The Hague convention relative to the opening of hostilities provides:

> The existence of a state of war must be notified to the neutral powers without delay.

That the belligerent may not be negligent in making this notification, it is further provided that the obligation of neutrality consequent upon the existence of a state of war "shall not take effect in regard to them until after the receipt of a notification, which may, however, be given by telegraph."

Certain possibilities of complications are introduced by the added clause:

> Neutral powers, nevertheless, can not rely on the absence of notification if it is clearly established that they were in fact aware of the existence of a state of war.

It is presumed that the burden of proof of the notification of the existence of a state of war would be upon the belligerent, and such proof might be difficult to establish.

There were at The Hague conference in 1907 several propositions looking to the establishing of a period of time after notification to the neutral during which period the obligations of neutrality should not be operative. The Belgian delegate suggested that the obligations of neutrality should become operative 48 hours after the receipt of the notification of the existence of war. It was pointed out that this might give occasion to the idea that neutrals might during this period act with impunity in a manner contrary to the obligations of neutrality. It might further be said that if the neutral is to be allowed a period after the notification in which neutral obligations shall not be binding, the aim of the belligerent on the offensive would be to have this period at such a time as would be of least advantage to his opponent. This question would, therefore, become one entering into the belligerent's considerations in determining the time of the declaration of war. As the belligerent would ordinarily wish to engage his opponent before he

had had time to prepare, and as a period of free commerce with a neutral would add to the opportunity to prepare, the belligerent on the offensive would often be influenced to declare war suddenly or in advance of a period which might otherwise elapse.

Prof. Westlake's opinion.—Prof. J. Westlake said concerning the Second Hague Convention relative to the opening of hostilities:

> This regulation coincides with the doctrine which we have laid down above. Only two remarks are needed in order to put the matter in a clear light. One is that the declaration of war is now expressly required to be motivée, which the declarants have always made it for their own justification. The other is that the commencement of hostilities without a preceding declaration, in such peculiar cases as are contemplated above, is left possible by the fact that the parties are not made to contract that they will not commence hostilities against one another otherwise than as described, but recognize that hostilities ought not (ne doivent pas) to be otherwise commenced.
>
> Nothing can more clearly show the impossibility of insisting on an interval of notice between a declaration of war and a commencement of hostilities under it than the fact that the very moderate proposal of a 24 hours' interval, made by the delegation of the Netherlands, was not accepted. The conference has therefore rather confirmed than weakened the necessity that, in order not to be taken unprepared, every nation must rely on its own vigilance and on no formal rule. (Westlake's Int. Law, Part II, War, p. 267.)

Reasons for Hague rules.—The discussion at The Hague in 1907 centered about the regulations in regard to the opening of hostilities which had been proposed and which followed closely those of the Institute of International Law at its season of 1906. As these were in their essential principles the same as those finally adopted, it is well to set forth the reasons for the French proposition. The reasons for their presentation were set forth by Gen. Amourel, one of the French delegates:

> En commençant la discussion du Projet de Règlement sur l'ouverture des hostilités que la Délégation française a eu l'honneur de soumettre à vos délibérations, il n'est sans doute pas inutile qu'elle vous fournisse quelques explications de nature à justifier les termes de sa proposition.
>
> Elle estime tout d'abord qu'il faut écarter la supposition d'une guerre faite sans raison sérieuse et apparente, ou sans qu'il se soit

produit au moins un incident susceptible, de donner lieu à une discussion. Une agression en pleine paix, sans motif plausible, n'est plus compatible avec le sentiment public des États du monde civilisé que nous représentons ici.

La guerre aura donc pour origine au moins un fait, ayant une certaine gravité, et pouvant motiver une échange d'explications. Alors commencera habituellement la période de négociations diplomatiques, au cours desquelles chaque Puissance cherchera à obtenir de l'autre des conditions propres à satisfaire ses intérêts. Si l'accord ne se réalise pas, l'une des Puissances peut avoir recours à la menace de guerre en fixant, par voie d'ultimatum, les concessions qu'elle exige. Elle fixe aussi, en général, un délai de réponse, après lequel elle se réserve de faire appel aux armes.

Quand les évènements se produisent sous cette forme, au début d'un conflit entre deux nations, il est bien certain que l'état de guerre se trouve déclaré d'une façon suffisante: l'ultimatum porte en lui-même l'avertissement préalable et non équivoque; il indique la concession exigée, et par conséquent la cause de la guerre en cas de refus; enfin, il limite même la guerre dans le temps, selon l'heureuse expression de notre excellent collègue de la Délégation de Russie, puisque l'état de guerre commence à la limite du délai de réponse.

Mais il se peut que le fait, origine du conflit, ne soit pas toujours suivi d'une conversation diplomatique. Dans certains cas, le dommage matériel ou moral causé à un État lui paraîtra assez grave pour qu'il ne juge pas possible de n'en pas chercher réparation par les armes. Il en est ainsi parfois dans les conflits entre deux individus, lorsque les témoins de l'un reçoivent mission de réclamer uniquement une rencontre.

Il se peut aussi que, au cours des négociations diplomatiques, celles-ci prennent une tournure telle que le réclamant perde tout espoir d'obtenir par cette voie des conditions suffisantes. Il pourra fort bien alors rompre brusquement l'entretien, et avoir recours à la force pour s'assurer la satisfaction qu'il juge nécessaire.

Dans ces deux cas, que la guerre éclate immédiatement ou pendant les pourparlers, elle commencera par la manifestation inopinée de la volonté expresse de l'une des Parties en présence. Mais il semble que, même alors, l'ouverture des hostilités doit se faire avec les mêmes garanties que lorsque la guerre éclate à la suite d'un ultimatum.

L'avertissement préalable et non équivoque et les motifs de la guerre se trouvent donné dans l'ultimatum lorsqu'il en est fait usage; nous demandons qu'ils soient compris dans une notification à l'adversaire, lorsque l'une des Parties prend la résolution de combattre sans avoir commencé, ou épuisé, la discussion diplomatique.

Il n'est pas nécessaire de justifier la condition que l'avertissement doit être non équivoque. Il devra aussi être préalable.

Nous entendons par là qu'il doit précéder les hostilités. Mais celles-ci peuvent commencer dès que l'avertissement sera parvenu à l'adversaire. La limitation de la guerre dans le temps sera ainsi moins nettement déterminée que dans le cas de l'ultimatum. Nous estimons, en effet, que les nécessités de la guerre moderne ne permettent pas de demander, à celui qui a la volonté d'attaquer, d'autres délais que ceux qui sont absolument indispensables pour que son adversaire sache que la force va être employée contre lui.

Nous pensons aussi que la déclaration de guerre doit être motivée; cette condition nous semble pouvoir être facilement acceptée, parce que les Puissances, ne se décidant à combattre que lorsqu'elles sont bien convaincues de leur droit, ne peuvent hésiter à le proclamer publiquement. En outre, il est particulièrement utile que les motifs de la guerre soient portés à la connaissance des États non mêlés au conflit mais qui vont en souffrir, et qui ont le droit de savoir pourquoi ils souffrent. Enfin, ces mêmes États, s'ils sont au courant des causes de la guerre, seront peut-être mieux disposés a offrir leurs bons offices, tout en respectant les intérêts en présence.

Ainsi se trouvent expliqués les termes de l'article I[er] de notre Projet de Règlement. Quant à l'article 2, il vous paraîtra sans doute nécessaire que l'état de guerre, qui n'intéresse pas seulement les belligérants, mais qui apporte aussi un grand trouble dans les affaires des pays neutres, soit notifié le plus tôt possible à ceux-ci.

Cela n'est-il pas d'ailleurs nécessaire si l'on veut mettre les neutres en mesure de remplir le rôle que leur réservent les articles 6 et 27 de la Convention du 28 juillet 1899?

Tels sont, Messieurs, les motifs que la Délégation française avait à vous exposer à l'appui de sa proposition, et elle serait heureuse que celle-ci put recevoir votre assentiment. (Deuxième Conférence Internationale, Tome III, p. 168.)

The general report, presented after the committee had fully considered the question of commencement of hostilities and formulated the regulations, does not add much to the reasons stated by the representative of the French delegation. (Deuxième Conférence Internationale, Tome I, pp. 131–136.)

Form of declaration of war.—A review of the forms of statement of declarations of war shows that no one form has been followed. Certain requisites are evident.

The declaration having the effect of changing the relations of the states in such a far-reaching manner must be made by a competent authority and to a competent authority. The competent authority may be determined

by the domestic law of a state as in the United States "Congress has power to declare war."

The declaration should be unequivocal. The change of relations from peace to war should not be a matter of uncertainty. All parties who may be affected by the existence of war have a right to know the fact.

A notice prior to the commencement of hostilities should be given as the date at which acts of hostility become valid should be established before rather than after the act or by the act.

As war is in itself so serious it is generally held that there should be a reason for war and that the state entering upon hostilities should announce the reason. Of course, it is well understood that the apparent may not always be the real reason, and sometimes it might be best for all parties that the reason be not too fully stated lest it make return to peace more difficult.

The declaration should of course be public and formal, as the conduct of foreign states is also influenced by the state of war. These essentials of the form of a declaration of war are simple and necessary in order that it may be valid and fully operative, viz, the declaration of war should be from the competent authority, in an unequivocal form, and published prior to the commencement of hostilities, and should give a reason for the war. Suggestions as to other requirements for a valid declaration have been made, such as that the causes should be stated in full, 24 hours or some minimum of time should elapse between the publication of the declaration and its operation, etc. These have not yet received sufficient support to be regarded as essential.

The declaration should therefore be:

1. From the competent authority.
2. To the competent authority.
3. Previous to the opening of hostilities.
4. Explicit and unequivocal.
5. Reasoned.

The method of notifying a neutral in order that there may be as little difference in interpretation as possible

should be a simple transmission to the proper neutral authority of a copy of the declaration made to the enemy.

Résumé.—The survey of practice and opinion indicates that the rules proposed in 1907 at the conference at The Hague reflected general opinion. Any wide departure from these rules would not at present receive much sanction. Most authorities contend that the main aim is to know definitely when war begins, if war is to be undertaken, and to know something of the reason for the war. Considering this condition of affairs the following Hague rules are thought sufficient:

REGULATIONS.

ARTICLE 1. Hostilities between the contracting powers must not commence without previous and explicit warning, in the form either of a reasoned declaration of war or of an ultimatum with conditional declaration of war.

ART. 2. The state of war must be notified to the neutral powers without delay, and shall not take effect in regard to them until after the receipt of a notification, which may even be given by telegraph. Neutral powers, nevertheless, can not plead the absence of notification if it is established beyond doubt that they were in fact aware of the state of war.

ART. 3. Article 1 of the present convention shall take effect in case of war between two or more of the contracting powers. Article 2 is binding as between a belligerent power, which is a party to the convention, and neutral powers, which are also parties to the convention.

Topic III.

LIMITATION OF ARMAMENTS.

What attitude should be assumed in regard to the limitation of armaments?

CONCLUSION.

In view of the evident differences of opinion and difficulties the wish expressed at The Hague in 1907 may be reaffirmed, viz, that the Governments "examine the possibility of an agreement as to the limitation of armed forces by land and sea and of war budgets."

NOTES.

General.—From the days of the saying that "all things are fair in war" there has developed in modern times a very decided opinion to the contrary. Restrictions upon the means and methods of injuring the enemy have been imposed. Many plans for doing away with the evils of war have been proposed.

On August 24, 1898, the Russian Czar caused his minister to hand to the diplomatic representatives at St. Petersburg a rescript which set forth the dangers of increasing armaments, and stated that—

> To put an end to these incessant armaments and to seek the means of warding off the calamities which are threatening the whole world—such is the supreme duty which is to-day imposed on all states.
>
> Filled with this idea, His Majesty has been pleased to order me to propose to all the Governments, whose representatives are accredited to the Imperial Court, the meeting of a conference which would have to occupy itself with this grave problem.
>
> This conference should be, by the help of God, a happy presage for the century which is about to open. It would converge in one powerful focus the efforts of all states which are sincerely seeking to make the great idea of universal peace triumph over the elements of trouble and discord.

It would, at the same time, confirm their agreement by the solemn establishment of the principles of justice and right, upon which repose the security of states and the welfare of peoples.

On January 1, 1899, in a circular the Czar proposes a program for the conference of the states of the world, placing before the conference as the first object that—

Of seeking without delay means for putting a limit to the progressive increase of military and naval armaments, a question the solution of which becomes evidently more and more urgent in view of the fresh extension given to these armaments; and

Of preparing the way for a discussion of the questions relating to the possibility of preventing armed conflicts by the pacific means at the disposal of international diplomacy.

Toward the realization of the objects he submitted the following subjects for discussion:

1. An understanding not to increase for a fixed period the present effective armed military and naval forces, and at the same time not to increase the budgets pertaining thereto; and a preliminary examination of the means by which a reduction might even be effected in future in the forces and budgets above mentioned.

2. To prohibit the use in the armies and fleets of any new kind of firearms whatever, and of new explosives, or any powders more powerful than those now in use, either for rifles or cannon.

3. To restrict the use in military warfare of the formidable explosives already existing, and to prohibit the throwing of projectiles or explosives of any kind from balloons or by any similar means.

4. To prohibit the use in naval warfare of submarine torpedo boats or plungers or other similar engines of destruction; to give an undertaking not to construct in the future vessels with rams.

5. To apply to naval warfare the stipulations of the Geneva Convention of 1864 on the basis of the additional articles of 1868.

6. To neutralize ships and boats employed in saving those overboard during or after an engagement.

7. To revise the declaration concerning the laws and customs of war elaborated in 1874 by the conference of Brussels, which has remained unratified to the present day.

8. To accept in principle the employment of good offices, of mediation and facultative arbitration in cases lending themselves thereto, with the object of preventing armed conflicts between nations, to come to an understanding with respect to the mode of applying these good offices, and to establish a uniform practice in using them.

The result of the discussion of the subject of limitation of armaments at the First Hague Conference, in which 26 states participated, was the passage of the following resolution:

That the restriction of military budgets which are at present a heavy burden on the world is extremely desirable for the increase of the material and moral welfare of mankind,

And a wish—

That the Governments taking into consideration the proposals made at the conference might examine the possibility of an agreement as to the limitation of armed forces by land and sea and of war budgets.

During the Conference of 1899 various propositions in regard to limitation of military budgets and of military forces were considered and argued. The subcommittee having the investigation within its field reported:

1. That it would be very difficult to fix, even for a period of five years, the number of effective forces, without at the same time regulating other elements of the nati nal defense.

2. That it would be no less difficult to regulate by an international convention the elements of that national defense which was organized in each country according to very different views. (Conférence Internationale de la Paix, 1899, Pt. I, p. 84.)

The Russian proposal to maintain the status quo of armaments of 1899 could not be adopted. Indeed, the difference of opinion on this matter at one time threatened the continued existence of the Conference itself.

There was a general agreement that the limitation of armament should be the subject of a profound study on the part of the states of the world.

Between the Conference of 1899 and that of 1907 there was much discussion of the problems of increasing armaments. The matter received attention in the parliaments of many states.

The subject was again brought up at the Conference of 1907, but not by Russia, whose delegate in the course of an extended address, and referring to the Czar's proposition for limitation of armament of 1899, said that " the contact with reality quickly disclosed that the noble thought of the Czar had concealed practical difficulties

when it was tested in practice." (Deuxième Conférence de la Paix, Tome I, p. 94.)

The Conference of 1907 confirmed the resolution of the Conference of 1899 and recommended that the Governments resume the serious examination of the question of limitation of military expenditures.

First Conference at Hague, 1899.—The Russian proposition of 1898 for the limitation of armaments by conventional agreements was not the first Russian proposition to this effect. After the Napoleonic war Alexander I had indorsed the idea of a limitation of the forces of European States. The Hague Conference of 1899 was sitting at a fortunate time to consider disarmament, as was pointed out by the chairman of the first commission which was entrusted with the consideration of the question of disarmament, limitation of budgets, etc.

Questions arose in regard to the basis of limitation. Should the basis be the number of the forces, the budgets or a combination of these elements? How should the figures be determined and verified? Should the status of the armed forces at the time serve as a basis? Questions of valuation of naval and land forces might be difficult. Colonial forces and defense might add to the complications.

After some of the more special items of the program of the Czar had been discussed the commission entered upon the consideration of the questions relating to limitation of armaments.

At this time M. Staal, the Russian delegate, who was president of the First Hague Conference, explaining Russia's attitude, said in addressing the president of the committee:

Monsieur le Président, je tiendrais à ajouter quelques mots aux paroles si éloquentes que vous venez de prononcer; je voudrais préciser la pensée dont s'est inspiré le Gouvernement russe et indiquer en même temps les étapes par lesquelles a passé la question qui nous occupe.

Dès le mois d'août 1898, le Gouvernement russe a invité les Puissances à rechercher, dans la voie de la discussion internationale, les moyens les plus efficaces de mettre un terme au développement progressif des armements actuels.

Un accueil empressé et sympathique fut fait à la demande du Gouvernement impérial par toutes les Puissances qui sont représentées ici. Toutefois, malgré l'enthousiasme qui avait salué cette proposition, le Gouvernement russe a jugé nécessaire de se renseigner auprès des Cabinets pour savoir si le moment actuel semblait favorable à la convocation d'une Conférence dont le premier but serait justement cette restriction des armements.

Les réponses qui nous ont été données, l'acceptation du programme esquissé dans la Circulaire du 30 décembre 1898, et dont le premier point vise la non-augmentation pour un terme à fixer des effectifs militaires actuels, nous ont décidés à prendre l'initiative de la Conférence de la Paix. C'est ainsi, Messieurs, que nous nous trouvons réunis à La Haye, animée d'un esprit de conciliation, et que nos bonnes volontés se rencontrent en vue d'une œuvre commune à accomplir.

Nos deux Sous-Commissions ont pris pour cadres les points 2, 3 et 4 de la Circulaire du 30 décembre. Ce sont, sans doute, des difficultés techniques et spéciales, dont je ne suis pas en mesure d'apprécier la portée, qui ont empêché de prendre toutes les décisions désirées. La Commission d'ailleurs a exprimé le vœu de renvoyer quelques unes de ces questions à une conférence ultérieure.

Mais nous avons encore à examiner un point essentiel qui est du ressort de la Commission: c'est la question de la limitation des budgets et des effectifs militaires. Il me parait d'autant plus nécessaire d'insister pour que cette importante question fasse l'objet de l'étude la plus approfondie, qu'elle renferme, je le répète, l'idée première qui nous a réunis, celle d'alléger le plus possible le fardeau effroyable qui pèse sur les peuples et qui entrave leur développement matérial et même moral. Les fruits de l'activité humaine sont absorbés dans une proportion croissante par les dépenses des budgets de la guerre et de la marine. Ainsi que l'a fort éloquemment dit l'honorable Général Den Beer Poortugael, il est d'importantes fonctions des nations civilisées qui souffrent de cet état de choses et qui sont reléguées au second plan.

La paix armée entraine aujourd'hui des dépenses plus considérables que les guerres les plus onéreuses d'autrefois. Si une autre Commission a reçu le mandat d'alléger, de mitiger les horreurs de la guerre, à vous Messieurs incombe la mission tout aussi grande d'allegér les charges de la paix, telles qu'elles résultent de cette concurrence incessante dans la voie des armements.

Il me sera permis d'espérer que, sur ce point tout au moins, l'attente des populations anxieuses qui suivent avec un intérêt soutenu nos travaux, ne sera pas trompé. Le déception serait cruelle.

C'est pour cette raison que je vous prie de porter toute votre attention sur les propositions que Messieurs les délégués tech-

niques de Russie vont développer devant vous; vous verrez que ces propositions constituent véritablement un minimum.

Ai-je besoin de dire qu'il ne s'agit point d'utopies ni de mesures chimériques. Il ne s'agit pas de procéder à un désarmement. Ce que nous souhaitons, c'est d'arriver à une limitation, à un temps d'arrêt dans la marche ascendante des armements et des dépenses. Nous le proposons dans la conviction que, si l'accord s'établit, on verra un mouvement en sens contraire s'accentuer peu à peu: l'immobilité n'est point du domaine de l'histoire et, si pendant quelques années nous aurons pu garder une certaine stabilité, tout porte à croire que la tendance bienfaisante à la diminution des charges militaires pourra s'affirmer et se développer. Ce mouvement répondra entièrement aux idées qui ont inspiré les circulaires russes.

Mais nous n'en sommes pas encore là. Pour le moment, nous ne tendons qu'à la stabilisation, pour un terme à fixer, des effectifs et des budgets militaires. (Conférence Internationale de la Paix, 1899. Pt. II, p. 28.)

This full statement of the importance attributed to this part of the program of the conference caused the members to give the subject of limitation of armaments careful attention.

Technical opinions, 1899.—The technical delegate, Col. Gilinsky, of Russia, said:

Le programme du Gouvernement russe vise deux objets:

Le premier est humanitaire, c'est d'éloigner la possibilité même de la guerre et d'en diminuer autant que possible les maux et les calamités.

Le second est fondé sur des considérations économiques: diminuer autant que possible le poids énorme des charges pécuniaires, que toutes les nations se trouvent obligées de supporter pour l'entretien des armées en temps de paix.

A la première tâche travaillent les Commissions destinées à élaborer les lois de l'arbitrage, des bons offices, les lois et usages de la guerre de terre, l'adaptation des principes de la Convention de Genève à la guerre maritime.

J'espère que leurs travaux seront couronnés d'un bon succès, mais il est permis de demander, Messieurs: les peuples représentés à la Conférence, seront-ils entièrement satisfaits si, en sortant d'ici, nous leur apportons l'arbitrage et les lois pour la guerre et rien pour le temps de paix, de cette paix armée, qui pèse si lourdement sur les nations, qui les écrase au point qu'on entend dire parfois qu'une franche guerre vaudrait peut-être mieux que cet état de guerre sourde, cette concurrence continuelle où tout

le monde met en avant de nombreuses armées, plue nombreuses maintenant en temps de paix qu'elles n'étaient autrefois au moment des plus grandes guerres. (Ibid., p. 30.)

Col. Gilinsky proposed for the realization of a plan for the limitation of military armaments the following means:

1. Establissement d'une entente internationale pour un terme de cinq ans, stipulant la non-augumentation du chiffre actuel des effectifs de paix des troupes entretenues dans les métropoles.

2. Fixation, en cas de cette entente, s'il est possible, du chiffre des effectifs de paix des armées de toutes les Puissances, non compris les troupes coloniales.

3. Maintien, pour le même terme, de cinq ans du montant du budget militaire actuellement en vigueur. (Ibid., p., 33.)

Later Col. Gilinsky explained the intention of these propositions as follows:

Après la séance du vendredi 23 juin, on m'a adressé plusieurs questions concernant les propositions russes que j'ai eu l'honneur de soumettre à la discussion de la première Commission et je demande à présent la permission de donner quelques explications.

On m'a fait observer que les deux premières propositions traitent la même question: pourquoi donc la partager en deux parties? Il y a pourtant une différence entre ces deux propositions; c'est-à-dire que la seconde est la suite de la première. La première traite la question en général: la question de principe. La Russie vous propose d'établir une entente stipulant la non-augmentation du chiffre actuel des effectifs de paix entretenus dans les métropoles. Si nous arrivons à une pareille entente, c'est alors que paraît la seconde proposition, la question des chiffres. Chaque pays devra déclarer, si nous le trouvons nécessaire, le total en chiffres ronds ou en chiffres précis—c'est encore selon notre décision—de ses troupes entretenues en temps de paix. Il est à définir s'il est question du nombre des soldats seulement sans compter les officiers et les sous-officiers. Notre proposition vise seulement le nombre total des soldats.

Il faudra déclarer ensuite le nombre total des recrues pour chaque année et qui ne pourra pas être dépassé pendant la durée de l'entente. Enfin, il faudra fixer le nombre d'années que le soldat reste sous les drapeaux, car vous savez bien, Messieurs, que le changement de ce terme influe sur le total de l'armée territoriale.

Voilà de quoi il s'agit dans le second paragraphe de la proposition russe.

Dans les deux propositions il s'agit des troupes entretenues dans les métropoles: les troupes coloniales sont excludes; car les colonies se trouvant toujours en danger ou même en état de guerre, il ne paraît donc pas possible d'interdire l'augmentation des troupes coloniales. La Russie n'a pas de colonies proprement dites, des possessions absolument séparées par la mer. Mais, nous avons des territoires qui, sous le point de vue de leur défense, se trouvent dans les mêmes conditions que les colonies, car ils sont separés du pays sinon par la mer, du moins par des distances énormes et la difficulté des communications: c'est l'Asie Centrale et la circonscription militaire de l'Amour. Les deux sont extremêment éloignées du centre de l'empire; dans les deux les troupes sont peu nombreuses et se trouvent en face d'armées très considérables qui sont plus près de nos troupes que les renforts que nous pouvons envoyer de Russie. Il n'y a donc pas moyen de mettre ces territoires éloignés dans les mêmes conditions que le centre du pays et de s'interdire la possibilité d'augmenter ces troupes en cas de nécessité; par conséquent, ces territoires doivent être considérés comme des colonies.

Le troisième point vise le budget ordinaire, c'est-à-dire le budget nécessaire pour l'entretien des troupes existantes; la fabrication des armes et les constructions qui ne sortent pas de l'ordinaire. Mais quand il s'agit du changement complet de canons ou de fusils ainsi que de la réconstruction des places fortes exigée par l'effet du nouveau canon de siège, la fabrication de la nouvelle arme demande des sommes enormes qui ne peuvent être trouvées dans les limites du budget ordinaire. Ces sommes là sont demandées par les Gouvernements de tous les pays en dehors du budget ordinaire; c'est le budget extraordinaire qui ne peut être ni prévu ni fixé. La haute Assemblée ayant sactionné le changement des armements, a sanctionné d'avance aussi le budget extraordinaire. (Ibid., p. 36.)

Capt. Schéine, technical delegate from Russia, proposed the following regulations in regard to naval armaments:

Accepter le principe de fixer, pour un terme de trois ans, le montant des budgets de la marine avec l'engagement de ne pas en augmenter le total pendant cette période triennale et l'obligation de faire connaître à l'avance pour la dite période:

1. Le total des tonnes des vaisseaux de guerre, qu'on se propose de construire, sans préciser les types mêmes des bâtiments;
2. Le nombre des officiers et des équipages de la marine;
3. Les dépenses pour les travaux des ports tels que forts, bassins et arsenaux, etc. (Ibid., p. 34.)

These proposed regulations were submitted to a subcommittee for examination and report. The subcom-

mittee was unable to reach any satisfactory conclusion. No practical method of arriving at a basis for reduction was found. The report of the committee was frankly admitted to be unsatisfactory. The essential parts were as follows:

Le Capitaine Schéine, après avoir constaté que le budget de la marine, visé dans les propositions russes, comprend le budget extraordinaire aussi bien que le budget ordinaire, a fait cette communication importante, qu'il est bien entendu que chaque Puissance garde une liberté entirère relativement au montant de la somme qu'elle s'engage, éventuellement pour un terme de trois ans, à ne pas dépasser. La Russie elle-même se propose préalablement de fixer le montant à 10 pour cent de plus que son budget actuel, mais chaque Puissance pourrait choisir comme base de l'engagement un budget augmenté dans la mesure qui lui paraît nécessaire, en allant jusqu'au maximum des augmentations annocées par les Puissances.

De l'échange de vues qui a eu lieu dans la Sous-Commission, il ressort:

1. Que quelques délégués entrevoient, en effet, une possibilité d'accepter, en principe, les propositions russes, mais doivent attendre pour se prononcer définitivement les instructions de leurs Gouvernements.

2. Que la majorité des délégués de la Sous-Commission n'a pas voulu se prononcer dans ce sens, attendu que, de prime abord, des difficultés constitutionnelles s'opposeraient, dans les pays parlementaires, à lier d'avance le vote budgétaire des assemblées législatives.

Lorsqu'enfin, après une discussion prolongée, il a paru impossible d'arriver à un accord ou de trouver un expédient autre que celui de laisser la question ouverte, le Président, M. Van Karnebeek, a proposé que les délégués recommanderaient à leurs Gouvernements une étude des propositions russes qui leur permettrait d'en décider dans une conférence ultérieure.

Cette proposition n'ayant pas obtenu la sanction de la Sous-Commission (5 voix pour, 5 voix contre et 5 voix s'abstenant), celle-ci a du passer au vote sur une motion du Capitaine Schéine, ayant pour but d'inviter les délégués à obtenir, dans le plus court délai possible, des instructions leur permettant de se prononcer avant la fin de la Conférence, d'une manière définitive, sur les propositions du Gouvernement russe. Sept voix ayant voté pour, une voix contre et sept s'abstenant, cette proposition du Capitaine Schéine a dû être regardée comme adoptée; et la Sous-Commission, ayant ensuite chargé quatre de ses membres de rapporter le résultat de ses délibérations à la première Commission, les soussignés, formant ce comité de rédaction, ont donc l'honneur de

constater que l'opinion qui a prévalu dans la Sous-Commission, tout en n'impliquant pas l'acceptation des propositions russes, n'exclut pas l'espoir que l'on réussira à trouver la voie menant au but d'introduire "un temps d'arrêt" dans les budgets de la marine.

Il reste avec la première Commission de confirmer ou d'infirmer par son vote, la proposition susmentionnée du Capitaine Schéine.

(s.) BILLE.
(s.) SOLTYK.
(s.) SCHÉINE.
(s.) CORRAGIONI D'ORELLI.

(Ibid., p. 46.)

Opinions in 1907.—The opinions expressed upon the subject of limitation of armaments at The Hague conference in 1907 may be regarded as deliberate because resulting from the study and examination of the subject by various states in accord with the recommendations of the conference of 1899.

Great Britain.—The British delegate expressed the opinion of his Government in a somewhat long statement. After reviewing the action of the Czar in inserting the question of limitation of armaments in the call for the conference in 1899, he showed that the expenditure for armaments had steadily increased between 1899 and 1907 on the part of most states. He asserted that Great Britain was decidedly in favor of the limitation of armaments if such a course was practicable. The British delegate said, in closing his remarks:

Mon Gouvernement reconnaît qu'il est du devoir de chaque pays de se protéger contre ses ennemis et contre les dangers qui peuvent le menacer. Il reconnaît de même que chaque Gouvernement a le droit et le devoir de décider ce qu'il convient à son pays de faire dans ce but. C'est donc seulement par la bonne volonté, la libre volonté de chaque Gouvernement agissant de son propre chef pour le bonheur de son pays, que l'objet de nos désirs peut se réaliser.

Le Gouvernement de Sa Majesté Britannique, reconnaissant que plusieurs Puissances désirent restreindre leurs dépenses militaires et que, par l'action indépendante de chaque Puissance, ce but peut être réalisé, a cru de son devoir de rechercher s'il y aurait des moyens de donner satisfaction à ces aspirations. Aussi nous a-t-il autorisé à faire la déclaration suivante:

Le Gouvernement de la Grande-Bretagne serait prêt à communiquer annuellement aux Puissances qui en agiraient de même le projet de construction de nouveaux bâtiments de guerre et les

dépenses que ce projet entraînerait. Cet échange de renseignements faciliterait un échange de vues entre les Gouvernements sur les réductions que, de commun accord, on pourrait effectuer.

Le Gouvernement Britannique croit que, de cette façon, on pourait arriver à une entente sur la question des sommes que les États pourraient allouer à ce chapitre de leur budget.

Finalement, Monsieur le Président, j'ai l'honneur de proposer l'adoption de la résolution suivante:

La Conférence confirme la résolution adoptée par la Conférence de 1899 à l'égard de la limitation des charges militaires; et, vu que les charges militaires se sont considérablement accrues dans presque tous les pays depuis la dite année, la Conférence déclare qu'il est hautement désirable de voir les Gouvernements reprendre l'étude sérieuse de cette question. (Deuxième Conférence de la Paix, Tome I, p. 92.)

United States.—A communication from the American delegation announced its support of the British proposition.

France.—The French delegation expressed approval of the British point of view.

Spain.—A similar communication was made by the Spanish delegation.

Argentine Republic and Chili.—The delegates from Argentine and Chilian Republics presented a communication setting forth the agreement between those two states by which their naval armaments had been limited.

Russia.—Recalling the fact that the Czar in 1899 had placed the subject of limitation of armaments at the head of his program and had made it the corner stone of his proposition, the Russian delegate, who was president of The Hague conference of 1907, said:

Mais ici encore la pratique de la vie ne devait pas répondre à l'idéalité du vœu. Ainsi que je viens de le signaler, deux État seuls, la République Argentine et le Chili, ont pu le réaliser en concluant une convention de désarmement, dont j'ai eu l'honneur de vous donner lecture. La plupart des Puissances européennes avaient d'autres préoccupations. A peine la Conférence avait-elle terminé ses travaux, que des désordres surgis dans un Empire de l'Asie orientale obligèrent les Gouvernements à y intervenir à main armée. Peu de temps après, une des grandes Puissances européennes se trouva engagée dans le Sud de l'Afrique dans une lutte qui exigea de sa part un grand effort militaire. Enfin, les dernières années, l'Extrême-Orient fut le théâtre d'une guerre colossale dont la liquidation est à peine terminée. Faut-il parler

aussi des luttes coloniales et des difficultés diplomatiques qui purent obliger momentanément telle Puissance à augmenter ses armements? Le résultat en fut que les Gouvernements, loin de pouvoir s'occuper, conformément au vœu exprimé par la Conférence, des moyens de limitation des armements, durent au contraire les augmenter dans des proportions que vient de vous indiquer en chiffres S. Exc. Sir Edward Fry.

C'est en considérant ces circonstances, Messieurs, que le Gouvernement russe a êvité d'inscrire cette fois dans le programme de la Conférence qu'il a proposé aux Puissances, la limitation des armements. Il jugeait d'abord que cette question n'etait pas mûre pour être discutée avec fruit. Il ne voulait ensuite pas provoquer de discussions qui, comme l'expérience de 1899 l'a démontré, ne pouvaient, contrairement au but qu'on poursuivait en commun, qu'accentuer entre les Puissances un désaccord en donnant lieu à des débats irritants. Il était pour sa part décidé à ne pas y participer et savait que c'était également la résolution de quelques autres Grandes Puissances.

Pourtant, les semences jetées lors de la première Conférence ont germé en dehors de l'action des Gouvernements. Un mouvement très accentué de l'opinion publique s'est produit dans différents pays en faveur de la limitation des armements, et les Gouvernements, dont les sympathies pour le principe n'ont pas diminué, malgré les difficultés de l'exécution, se trouvent en face de manifestations qu'ils ne sont pas en mesure de satisfaire.

C'est ainsi, Messieurs, que le Gouvernement britannique, traduisant ses propres préoccupations et se faisant l'organe du sentiment public, témoigna son intention d'attirer tout de même sur la question de la limitation des armements l'attention des Puissances réunies en Conférence à La Haye et que son premier délégué vient de nous saisir du vœu que le Cabinet de Londres voudrait voir émis par nous.

Je ne trouve, pour ma part, aucun autre moyen de témoigner l'intérêt que les Puissances portent à cette question. Si elle n'était pas mûre en 1899, elle ne l'est pas d'avantage en 1907. Rien n'a pu être fait en cette voie et la Conférence se trouve aujourd'hui tout aussi peu préparée à l'aborder qu'alors. Toute discussion, stérile en elle-même, ne serait que nuisible à la cause qu'on a eu en vue en accentuant les divergences d'appréciation sur les questions de fait, tandis qu'il y a unité d'intentions générales qui pourraient un jour trouver leur réalisation. (Deuxième Conférence de la Paix, Tome, I, p. 94.)

Hague wish, 1907.—The conference at The Hague in 1907 was able to reach no conclusion other than that the Governments "taking into consideration the proposals made at the conference, may examine the possibility of

an agreement as to the limitation of armed forces by land and sea, and of war budgets."

Convention of Argentine and Chili, 1902.—In 1902 the Argentine and Chilean Republics agreed upon a convention in regard to the limitation of armaments for a period of five years. The essential portions of this convention are:

ARTICLE PREMIER. Dans l'esprit de dissiper tout motif d'inquiétude et de méfiance dans l'un ou l'autre pays, les Gouvernements du Chili et de la République Argentine, désistent d'entrer en possession des navires de guerre qu'ils ont actuellement en construction ainsi que de faire pour le moment de nouvelles acquisitions.

Le deux Gouvernements conviennent de plus réduire leurs escadres respectives, et à cet effet ils poursuivront leurs pourparlers en vue d'arriver à un accord qui établisse une équivalence raisonnable entre les deux escadres. Cette réduction de la flotte se fera dans le délais d'un an à compter de la date de l'échange de la présente Convention.

ARTICLE 2. Les deux Gouvernements s'engagent à ne pas augmenter leurs forces navales pendant une durée de cinq ans, avec la condition pour celui des deux qui aurait l'intention d'augmenter ses forces de donner à l'autre Gouvernement avis préalable, en le prévenant dix-huit mois d'avance. Il est entendu que demeure exclu de cet engagement tout armement relatif aux fortifications des côtes et des ports, l'un et l'autre pays conservant également toute faculté pour acquérir tout engin flottant destiné exclusivement à la défense des côtes et des ports, tels que: sous-marins, etc.

General view.—The broad view which was taken in the conferences at The Hague in 1899 and 1907 show how difficult it is to reach a basis upon which to negotiate for the limitation of armaments. The propositions made at The Hague and elsewhere have received attention, but none have seemed to appeal to the nations of the world as immediately practicable. The proposition for an "international armament holiday" or for an agreement to fix a period during which preparations for war should cease has been made and has been given support. The practical method of carrying out such an agreement has, however, presented many difficulties.

The convention of 1902, between the Argentine and Chilean Republics, shows what may be done where the conditions are similar and where the disposition exists.

Other agreements and understandings show a gradual development of policy in regard to limitation of armaments. The testimony seems to be that before a practical means of restricting preparation for war can be found the actual conditions confronting the various States must be much more fully understood and the subject must receive much more careful attention in all its bearings. This is evident in the review of the positions assumed at The Hague in 1899 and 1907, as well as in subsequent negotiations.

Conclusion.—In view of the evident differences of opinion and difficulties the wish expressed at The Hague in 1907 may be reaffirmed, viz, that the Governments "examine the possibility of an agreement as to the limitation of armed forces by land and sea and of war budgets."

Topic IV.

ENEMY VESSELS AND THEIR PERSONNEL.

What treatment should enemy vessels and their personnel receive?

CONCLUSIONS.

(a) *Public vessels.*—Public vessels of the enemy may be captured or destroyed, except the following when innocently employed:

1. Cartel ships designated for and engaged in exchange of prisoners.
2. Vessels engaged in scientific work.
3. Properly designated hospital ships.
4. Vessels exempt by treaty or special proclamation.

(b) *Days of grace for private vessels of the enemy.*—A reasonable period of grace, to be determined by each belligerent, shall be allowed for vessels of the other belligerent bound for or within the opponent's ports at the outbreak of war.

(c) *Private vessels.*—Private vessels of the enemy may be captured, except the following when innocently employed:

1. Cartel ships designated for and engaged in exchange of prisoners.
2. Vessels engaged in religious, philanthropic, and scientific work.
3. Properly designated hospital ships.
4. Small coast fishing vessels.
5. Small boats employed in local trade, e. g., transporting agricultural products.
6. Vessels exempt by treaty or special proclamation.

(d) *Personnel of public vessels of the enemy.*—

1. The personnel of public vessels which are liable to capture are liable to be made prisoners of war.
2. The personnel of enemy public vessels which are exempt from capture share in the exemption so long as innocently employed.

(e) *Personnel of private vessels of the enemy* (Arts. V–VIII, Hague Convention XI).—

ART. V. When an enemy merchant ship is captured by a belligerent, such of its crew as are nationals of a neutral State are not made prisoners of war.

The same rule applies in the case of the captain and officers likewise nationals of a neutral State, if they promise formally in writing not to serve on an enemy ship while the war lasts.

ART. VI. The captain, officers, and members of the crew, when nationals of the enemy State, are not made prisoners of war on condition that they make a formal promise in writing not to undertake, while hostilities last, any service connected with the operations of the war.

ART. VII. The names of the persons retaining their liberty under the conditions laid down in Article V, paragraph 2, and in Article VI, are notified by the belligerent captor to the other belligerent. The latter is forbidden knowingly to employ the said persons.

ART. VIII. The provisions of the three preceding articles do not apply to ships taking part in the hostilities.

(f) *Passengers on private vessels of the enemy.*—Innocent passengers on a private vessel of the enemy are to be accorded the utmost freedom consistent with the necessities of war.

NOTES.

Definitions.—Certain definitions of terms precede the French instructions of 1912, which, though not clearly distinguished in some writers, can be with propriety and advantage differentiated:

Dans tout le cours des présentes instructions, les expressions *capture, saisie, confiscation, séquestre* ont été employées avec le sens et dans le but qui vont être indiqués.

1. *Opérations effectuées par le bâtiment de guerre.*—La *capture* est l'acte purement militaire par lequel le commandant du navire de guerre substitue son autorité à celle du capitaine du navire de commerce, dispose du navire, de son équipage et de sa cargaison comme il est dit aux présentes instructions, sous réserve du jugement ultérieur du Conseil des prises quant au sort définitif du navire et de sa cargaison.

La *saisie*, lorsqu'elle s'applique aux marchandises seules, est l'acte par lequel le navire de guerre, avec ou sans l'assentiment du capitaine du navire arrêté, s'empare et dispose de ces marchandises comme il est dit aux présentes instructions, sous réserve du jugement ultérieur du Conseil des prises.

La *saisie*, lorsqu'elle s'applique au navire, diffère de la capture en ce que le sort ultérieur du navire n'est pas en cause quant à l'eventualité de sa confiscation. Il y a saisie, lorsque le navire doit être mis sous séquestre pendant la durée des hostilités; il y a

saisie, lorsque le navire doit être contraint de venir debarquer sa marchandise illicite dans un port national ou allié, sous réserve du jugement ultérieur du Conseil des prises quant au sort de cette marchandise.

La *saisie* est toujours accompagnée des opérations d'inventaire et d'apposition des scellés.

Le mot *prise* est une expression générale s'appliquant au navire capturé ou à la marchandise saisie. (See Appendix.)

Classification of vessels in time of war.—In a broad way vessels in time of war may be classified as belligerent vessels and as neutral vessels.

In general the neutral or enemy character of the vessel is determined by the flag the vessel is entitled to fly.

Belligerent vessels may be public vessels or may be private vessels.

Similarly, neutral vessels may be public or private.

The treatment of vessels will be determined by the rights of the class to which they belong.

Enemy public vessels.—The public vessels of the enemy are liable to capture or destruction unless exempt by special convention or under the general principles of international law.

The following public vessels of the enemy are exempt from capture or destruction when *innocently employed:*

1. Cartel ships designated for and engaged in exchange of prisoners.
2. Vessels engaged in scientific work.
3. Properly designated hospital ships.
4. Vessels exempt by special convention or agreement.

The provision that such vessels shall be *innocently employed* may relate to any fact connected with their employment. Some States have by treaty or other agreement and sometimes by special proclamation exempted mail vessels or some particular class of vessels.

The rules in regard to the general right of capture of public vessels of the enemy are so generally recognized as to need little discussion.

Enemy private vessels.—Under the present rules private vessels of the enemy are subject to capture unless exempt by special convention or under the general principles of international law.

The following private vessels of the enemy are exempt from capture *when innocently employed:*

1. Cartel ships designated for and engaged in exchange of prisoners.
2. Vessels engaged in religious, philanthropic, and scientific missions.
3. Properly designated hospital ships.
4. Small coast fishing vessels.
5. Small boats employed in local trade.
6. Vessels exempt by treaty or special proclamation.

As in the case of public vessels, the provision relating to innocent employment is strictly construed.

In the case of private vessels the question of determination of right to fly the flag may involve visit and search, but it may be said that the principles as set forth in article 57 of the declaration of London of 1909 and in the general report upon that article are usually accepted:

ARTICLE 57.

Subject to the provisions respecting the transfer of flag, the neutral or enemy character of a vessel is determined by the flag which she has the right to fly.

The case in which a neutral vessel is engaged in a trade which is reserved in time of peace, remains outside the scope of, and is in no wise affected by, this rule.

The principle, therefore, is that the neutral or enemy character of a vessel is determined by the flag which she has the right to fly. It is a simple rule which appears satisfactorily to meet the special case of ships, as compared with other movable property, and especially with merchandise. From more than one point of view ships have a kind of individuality, especially they have a nationality, a national character. This nationality is manifest in the right to fly the flag; it places the ships under the protection and control of the State to which they belong; it makes them amenable to the sovereignty and to the laws of that State, and, should the occasion arise, to requisition. This is the surest test of whether a vessel is really a part of the merchant marine of a country, and therefore the best test for determining whether she is neutral or enemy. It is, moreover, expedient to rely exclusively upon this test, and to discard whatever is connected with the personal status of the owner.

The text mentions the flag which the vessel has the right to fly; that means, naturally, the flag which, whether she is actually

flying it or not, the vessel has the right to display according to the laws which govern the port of the flag.

Article 57 safeguards the provisions respecting transfer of flag, as to which it is sufficient to refer to articles 55 and 56; it might be that a vessel would really have the right to fly a neutral flag, from the point of view of the law of the country to which she claims to belong, but may be regarded as an enemy by a belligerent, because the transfer in virtue of which she has hoisted the neutral flag is annulled by article 55 or by article 56.

Lastly, the question was raised whether a vessel loses her neutral character when she is engaged in a trade which the enemy, prior to the war, reserved for his national vessels. An agreement could not be reached, as has been explained above, in connection with the chapter on Unneutral service, and the question remains wholly open, as the second paragraph of article 57 is careful to state.

Consideration of exemptions.—It should be borne in mind that many of the propositions in regard to the exemption from capture of enemy private property at sea would include exemption of innocent enemy ships.

That this exemption does extend to vessels is evident in the treaty of 1871 between the United States and Italy, which, after stating the general principle of exemption of private property except contraband of war, says in Article XII, "it being understood that this exemption shall not extend to vessels and their cargoes which may attempt to enter a port blockaded by the naval forces of either party."

Ships engaged in exchange of prisoners under cartel agreements are by contract exempt while fulfilling their mission.

Vessels engaged in religious, philanthropic, and scientific missions are exempt under article 4 of The Hague convention relative to certain restrictions on the exercise of the right of capture in maritime war. The proposition which led to the formulation of this regulation was proposed by Italy and was also coupled with the recommendation that the state to which the vessel belongs should notify the opposing belligerent of the fact in order that a safe conduct might issue and that measures might be taken that it should be respected. This qualification of the regulation was not adopted.

The exemption of hospital ships was an extension of the principles of the Geneva convention of 1864 through its elaboration for maritime warfare in 1906. The regulations for the treatment of such ships are very well established.

Small coast fishing vessels were granted exemption in early days. An agreement between the King of England and the King of France in 1403 was followed by other similar agreements exempting coast fishing vessels and fishermen, "provided they should comport themselves well and properly." Practice and opinion favored such exemption because the occupation of the fishermen had little or no bearing upon the war.

From the early days of the United States this exemption of coast fishermen has been advocated, and the provision for exemption was embodied in some treaties. The treaty between the United States and Prussia of 1785 contained a clause relating to this matter, which was repeated in subsequent treaties between the same states:

ART. 23. * * * All women and children, scholars of every faculty, cultivators of the earth, artisans, manufacturers, and fishermen, unarmed and inhabiting unfortified towns, villages, or places, and in general all others whose occupations are for the common subsistence and benefit of mankind, shall be allowed to continue their respective employments, and shall not be molested in their persons; nor shall their houses or goods be burnt or otherwise destroyed, nor their fields wasted by the armed force of the enemy into whose power, by the events of war, they may happen to fall; but if anything is necessary to be taken from them for the use of such armed force, the same shall be paid for at a reasonable price.

With few exceptions, exemption of coast fishermen with their vessels has been the rule, so that the Supreme Court of the United States said, after reviewing precedents, opinions, and practice in 1900 in the case of the *Paquete Habana:*

This review of the precedents and authorities on the subject appears to us abundantly to demonstrate that at the present day, by the general consent of the civilized nations of the world, and independently of any express treaty or other public act, it is an established rule of international law, founded on considerations of humanity to a poor and industrious order of men, and of the

mutual convenience of belligerent states, that coast-fishing vessels, with their implements and supplies, cargoes and crews, unarmed, and honestly pursuing their peaceful calling of catching and bringing in fresh fish, are exempt from capture as prize of war.

The exemption, of course, does not apply to coast fishermen or their vessels, if employed for a warlike purpose, or in such a way as to give aid or information to the enemy; nor when military or naval operations create a necessity to which all private interests must give away.

Nor has the exemption been extended to ships or vessels employed on the high sea in taking whales or seals, or cod or other fish which are not brought fresh to market, but are salted or otherwise cured and made a regular article of commerce. (U. S. Supreme Court Reports, vol. 175, p. 677.)

The exemption of small boats employed in local trade is not supported by such an array of precedents and opinions, but the arguments for this exemption are upon practically the same grounds.

The proposition of Rear Admiral Haus, of Austria, at the Second Hague conference shows the intent of the exemption:

A l'égard des bateaux de pêche côtière, sont, exemptés de capture les bateaux et barques affectés dans les eaux territoriales de quelques pays au service de l'économie rurale ou à celui du petit trafic local.

Ce n'est que dans les cas où des raisons militaires l'exigent, que lesdits bateaux et barques pourront être réquisitionnés contre indemnité conformément aux dispositions en vigueur pour la guerre sur terre.

Cette proposition ne vise que les bateaux et barques de petites dimensions et destinés au transport de produits agricoles ou de personnes le long de côtes accores, ou entre la côte et des îles situées au-devant, ou dans les archipels, ou enfin dans les canaux des côtes plates.

Sans porter, d'une part, un préjudice quelque peu sensible au commerce ou aux resources de l'État ennemi, et sans rapporter, d'autre part, au capteur un bénéfice pouvant pour lui entrer en ligne de compte, la capture de ces embarcations ne ferait, en réalité, que compromettre l'existence de marins, d'insulaires ou d'habitants du littoral se trouvant tout dans une situation de fortune des plus précaires, réduits qu'ils sont au maigre produit de leur métier.

Il semble donc s'imposer, dans l'intérêt de l'humanité, d'interdire la capture des bateaux et barques en question, excepté les cas d'exigences militaires. Mais même dans cette dernière hypothèse la capture ne devrait être admise que contre indemnité.

Abstraction faite de ces sentiments humanitaires, la capture desdites embarcations se présente comme une inconséquence évidente, si l'on considère cette mesure au point de vue des principes régissant la guerre sur terre.

Car, si la côte se trouve être occupée par des troupes de terre, les bateaux et barques, dont il s'agit comme étant de la propriété privée, échappent nécessairement à toute prise et pourraient, tout au plus, être mis en réquisition.

Aussi ne saurait-on-guère trouver un motif raisonnable qui pût être invoqué pour autoriser des forces navales, ayant occupé des eaux territoriales, à procéder, sans en avoir le moindre profit, à la capture, voir même à la destruction de ces mêmes embarcations. (Deuxième Conférence de la Paix, Tome III, p. 910.)

The official report upon the interpretation of The Hague convention, which provided for the exemption from capture of "small boats employed in local trade," said:

Conformément à la proposition de l'Autriche-Hongrie, le texte étend dans les mêmes conditions l'immunité à la petite navigation locale, c'est-à-dire aux bateaux et barques de petite dimension transportant des produits agricoles et se livrant à un modeste trafic local, par example entre la côte et des îles ou ilots voisins. (Deuxième Conférence de La Haye, Tome I, p. 271.)

It is evident from the purpose of the regulation and from the official interpretation that it was the intent to restrict the exemption within narrow limits.

Days of grace.—The subject of delay to be accorded to merchant ships of one belligerent within ports of the other belligerent at the outbreak of war was considered by the Naval War College in 1906 and in 1910. The regulations proposed in 1906 were—

1. Each state entering upon a war shall announce a date before which enemy vessels bound for or within its ports at the outbreak of war shall under ordinary conditions be allowed to enter, to discharge cargo, to load cargo, and to depart, without liability to capture while sailing directly to a permitted destination. If one belligerent state allows a shorter period than the other, the other state may, as a matter of right, reduce its period to correspond therewith.

2. Each belligerent state may make such regulations in regard to sojourn, conduct, cargo, destination, and movements after departure of the innocent enemy vessels as may be deemed necessary to protect its military interests.

3. A private vessel suitable for warlike use belonging to one belligerent and bound for or within the port of the other belligerent at the outbreak of war is liable to be detained unless the government of the vessel's flag makes a satisfactory agreement that it shall not be put to any warlike use, in which case it may be accorded the same treatment as innocent enemy vessels. (International Law Topics, 1906, p. 46.)

The American delegation at the Second Hague Conference in 1907 maintained that the practice of exempting from capture enemy ships in an opponent's ports at the outbreak of hostilities had acquired the force of a general obligation. The British delegation regarded the exemption as a matter of favor which might or might not be granted. The only agreement that could be reached was that embodied in the convention relative to the status of enemy merchant ships at the outbreak of hostilities. This convention provides that "it is desirable" that merchant ships of one of the belligerents in an enemy port at the outbreak of hostilities "be allowed to depart freely, either immediately or after a sufficient term of grace," with provision for safe conduct along prescribed route. The convention, while granting some exemptions, does not seem to be as liberal as modern practice. The report of the American delegation in setting forth their reasons for not signing the convention shows this. (Senate Doc. 444, 60th Cong., 1st sess., 1908.)

The discussion in the International Law Situations for 1910 shows that Great Britain was unfavorable to the more liberal treatment of enemy vessels in port at outbreak of hostilities. The course of the development of the rule for the days of grace is shown in the International Law Situations for 1910, pages 66 to 78. The rule that was finally evolved at the Second Hague Conference in 1907 was as follows:

When a merchant ship of one of the belligerent powers is at the commencement of hostilities in an enemy port, it is desirable that it be allowed to depart freely, either immediately or after a sufficient term of grace, and to proceed direct, after being furnished with a passport to its port of destination or to such other port as shall be named for it.

The same applies in the case of a ship which left its last port before the commencement of the war and enters an enemy port in ignorance of the hostilities.

Mail vessels.—By certain treaties between states, mail steamers are made exempt from interference by the enemy. Sometimes such vessels are exempt under proclamation. The growing use of mail as the means of innocent communication, and the use of other means, such as the telegraph, for warlike purposes, has tended to incline opinion toward the exemption of mail vessels when they are employed strictly for that service, but this has not become a part of international law. Great Britain and the United States in 1848, and Great Britain and France in 1860, made conventions by which mail vessels were to continue their service during war until notification that it was to be discontinued, and in such case the vessel was to be permitted to return without interference.

The convention of 1907, relative to certain restrictions on the exercise of the right of capture in maritime war, article 2, says of the inviolability of mails that—

The ship, however, may not be searched except in case of necessity, and then only with as much consideration and expedition as possible.

Under exceptional conditions during the Chino-Japanese war the prize law of Japan in 1894 exempted "boats belonging to lighthouses," and in 1904, "lighthouse vessels and tenders" were exempted.

In early days it was not unusual for one belligerent to hold in its ports vessels of the other belligerent until he knew what treatment his own vessels were to receive in the harbors of his opponent.

In general, exemptions would not be granted to vessels which are involved in the hostilities or to vessels "whose construction indicates that they are intended to be converted into ships of war."

Rules of the Institute of International Law, 1913.—In section 2 of the Manual of the Institute of International Law in 1913 there is the following provision:

ART. 2.—*Bâtiments de guerre.*—Font partie de la force armée d'un État belligérant et sont, dès lors, soumis comme tels aux lois, de la guerre maritime:

1° tous bâtiments appartenant à l'État qui, sous la direction d'un commandant militaire et montés par un équipage militaire, portent, avec autorisation, le pavillon et la flamme de la marine militaire.

2° les navires publics, transformés par l'État en bâtiments de guerre conformément aux articles 3 et 6.

Persons on enemy vessels.—The treatment of persons found on board enemy vessels has not always been uniform. It has varied under different flags and at different times under the same flag. Some complications have arisen because vessels are of different classes and some difficulties because vessels may pass from one class to another by the action of those who are in control of their movements. The conduct or other relations of the persons on board an enemy vessel may also affect their treatment.

Early French regulations.—An order of the days of Napoleon provides for prisoners taken in war on the sea:

ART. 35. Tout capitaine de navire armé en guerre qui aura fait des prisonniers à la mer, sera tenu de les garder jusqu'au lieu de sa première relâche dans un port de France, sous peine de payer, pour chaque prisonnier qu'il aura relâché, cent francs d'amende au profit de la caisse des invalides de la marine, laquelle sera retenue sur ses parts de prises ou salaires, et prononcée par le conseil des prises.

ART. 36. Lorsque le nombre des prisonniers de guerre excédera celui du tiers de l'équipage, il est permis au capitaine preneur d'embarquer le surplus de ce tiers; et dans le cas où il manqueroit de vivres, un plus grand nombre, sur les navires des Puissances neutres qu'il rencontrera à la mer, en prenant, au bas d'une liste des prisonniers ainsi débarqués, une soumission signée du capitaine du bâtiment pris, et des autres principaux prisonniers, portant qu'ils s'engagent à faire échanger et renvoyer un pareil nombre de prisonniers français de même grade; laquelle liste originale sera remise, à la première relâche dans les ports de France, à l'administrateur de la marine; et, dans les ports étrangers, au commissaire des relations commerciales de la République française.

ART. 37. Il est permis aux capitaines qui relâcheront dans les ports des Puissances neutres, d'y débarquer les prisonniers de

guerre qu'ils auront faits, pourvu qu'ils en aient justifié la nécessité aux agents de la République, dont ils seront obligés de rapporter une permission par écrit, lesquels remettront lesdits prisonniers au commissaire de la nation ennemie, et en tireront un reçu avec obligation de faire tenir compte de l'échange desdits prisonniers par un pareil nombre de prisonniers française de même grade.

ART. 38. Dans l'un et l'autre cas, les capitaines preneurs seront obligés, sans pouvoir s'en dispenser sous quelque prétexte que ce puisse être, de garder à leur bord le capitaine avec un des principaux officiers de l'équipage du bâtiment pris, pour les ramener dans les ports de France, où ils seront retenus pour servir d'otages, jusqu'à ce que l'échange promis ait été effectué. (Boucher, Institution au droit maritime (1803), p. 574.)

French regulations, 1912.—The French regulations of December 19, 1912, briefly state:

146. Si le navire capturé est un bâtiment de guerre, vous transborderez le capitaine, la majeure partie des officiers, une portion de l'équipage, et vous conduirez ces prisonniers dans un port français ou allié, ou occupé par les forces armées françaises ou alliées.

Passengers and others.—The treatment of those who may be with the military forces, whether on land or on sea, has received consideration in international conferences and has been the subject of domestic regulations. The regulations in regard to their treatment in time of land warfare are well defined. The regulation of The Hague convention respecting the laws and customs of war on land of 1907 accords with generally accepted practice:

ART. 13. Individuals who follow an army without directly belonging to it, such as newspaper correspondents and reporters, sutlers, and contractors, who fall into the enemy's hands and whom the latter thinks expedient to detain are entitled to be treated as prisoners of war, provided they are furnished with a certificate from the military authorities of the army which they were accompanying.

The rules proposed at the meeting of the Institute of International Law in 1913, to be considered at the Oxford meeting in 1913, were similar in principle to those of The Hague conference of 1907. The wording is slightly different, however, as the control of the sea

can not be of exactly the same character as the control over the land area. The proposed article 66 was:

Les individus qui suivent une force navale sans en faire partie, tels que les fournisseurs, correspondants de journaux, etc., et qui tombent au pouvoir de l'ennemi, et que celui-ci juge utile de détenir, ne peuvent être détenus qu'aussi longtemps que les nécessités militaires l'exigent. Ils ont droit au traitement des prisonniers de guerre.

This article was the subject of a considerable interchange of views. The brief statement of this interchange is given in the report:

L'article du projet assimilait, en les traitant tous comme des prisonniers de guerre, si le belligérant a jugé utile de les détenir, les correspondants et reporters de journaux attachés à une escadre et embarqués sur cette force navale et ceux se trouvant à bord d'un navire public ou privé; et, pour les premiers, à la différence du Règlement de La Haye sur les lois de la guerre sur terre, il n'exigeait pas qu'ils fussent munis d'une légitimation de l'autorité militaire de la force qu'ils accompagnent. Cet article a été l'objet d'un certain nombre d'observations de la part des membres de la Commission, et celle-ci lui a fait subir sur divers points des modifications.

M. Hagerup a d'abord demandé qu'on rétablît dans l'article la nécessité de la légitimation exigée par le Règlement de La Haye. Mais M. Edouard Rolin Jaequemyns a fait remarquer, et la Commission s'est rangée à son avis, que cette exigence serait ici superflue; car, tandis que dans la guerre sur terre les correspondants de journax pourraient être considérés comme espions à défaut d'une légitimation de l'autorité militaire compétente, ils sont dans la guerre maritime libres en principe comme tous les autres passagers trouvés sur le navire.

Le projet, en reconnaissant au belligérant le droit de detenir "s'il le jugeait utile" les correspondants de journaux, lui donnait un pouvoir qui a semblé exagéré à la Commission. Celle-ci a déclaré, sur l'observation de M. Hagerup, qu'il ne pourrait les detenir "qu'aussi longtemps que les nécessités militaires l'exigeraient." Leur situation a été nettement précisée après un échange de vues entre MM. Hagerup, Kaufmann, Edouard Rolin Jaequemyns et Strisower: les correspondants de journaux doivent, en règle générale, être laissés libres; ils ne peuvent être faits prisonniers de guerre; mais le belligérent peut, si les nécessités militaires l'exigent, les retenir et, s'il les retient, ils auront droit au traitement des prisonniers de guerre.

Un pareil traitement ne devra, toutefois, d'après la Commission, être attribué aux correspondants de journaux que s'ils sont em-

barqués sur une force navale. S'ils sont à bord d'un navire public ou privé, ils seront laissés libres comme les autres passagers du navire: on ne saurait les traiter plus sévèrement que les membres de l'equipage du bâtiment sur lequel ils se trouvent. La Commission a donc décidé de supprimer le second alinéa de l'article. M. Kaufmann aurait voulu qu'on appliquât le traitement reconnu aux journalistes à bord d'une force navale à tous ceux se trouvant sur un navire quelconque "dans le rayon d'action d'une escadre." Mais on a fait remarquer que le rayon d'action bâtiments dans la zone des opérations militaires avait été reglée par l'article 67 du projet (article 53 de la Commission).

La Commission a pensé qu'il était inutile de prévoir les reporters à côté des correspondants de journaux: ce dernier terme est assez large pour englober les uns et les autres. Mais elle a jugé nécessaire d'assimiler spécialement aux correspondants de journaux certains individus qui, en dehors d'eux, peuvent aussi se trouver sur un navire, comme des fournisseurs: l'énumération qu'elle a donnée à cet égard n'a pas un caractère limitatif.

M. Holland a proposé, et la Commission a décidé, de supprimer de la disposition du projet le mot "armée", qui semblait se référer plutôt à la guerre sur terre, et les expressions "attachés à une escadre," dont le sens ne laissait pas d'être un peu obscur.

Correspondents, reporters, etc., may be regarded as belonging in some degree to the forces of the enemy, and therefore liable to detention as prisoners of war.

Passengers who are paying for transit are in a somewhat different relation. There is not an exact parallel in land warfare to passengers on a vessel flying an enemy flag. Passengers may have no choice of means of transport in time of war. Their carriage may have no relation to the war. The tendency in land warfare has been to give to noncombatants the largest possible degree of freedom. The rule proposed by the Institute was:

ART. 67. Les passagers qui, sans faire partie de l'équipage, se trouvent à bord d'un navire ennemi ne peuvent être retenus comme prisonniers de guerre par l'ennemi, à moins qu'ils ne se soient rendus coupables d'un acte hostile.

Les passagers militaires et les passagers civils déjà enrôlés peuvent être capturés comme prisonniers de guerre, même si le navire n'est pas susceptible de confiscation.

The article proposed in 1912 was as follows:

ART. 81. Les passagers qui, sans faire partie de l'équipage, se trouvent à bord d'un navire ennemi ne peuvent être retenus par

l'ennemi, à moins qu'ils ne se soient rendus coupables d'un acte hostile: en pareil cas, ils peuvent être faits prisonniers de guerre.

Les passagers militaires et les passagers civils déjà enrôlés peuvent être capturés comme prissoniers de guerre, même si le navire n'est pas susceptible de confiscation.

The reasons for the changes are thus stated in the report of the committee and illustrate the ideas of several representatives:

La rédaction de l'alinéa 1er de l'article 81 été légèrement modifiée dans sa forme pour donner satisfaction à une observation de M. Dupuis. Le projet, jugeant qu'il y avait là une question de legislation intérieure, n'avait pas cru devoir se préoccuper des pénalités auxquelles, en dehors du traitement de prisonniers de guerre, un belligérant pourrait soumettre les passagers qui se seraient rendus coupables d'un acte hostile. Or, tel qu'il était libellé, l'article 81 permettait de croire que le traitement de prisonniers de guerre serait l'unique sanction infligée à ces passagers. Pour bien indiquer la possibilité de pénalités, sans toutefois la mentionner expressément dans l'article comme l'auraient désiré certains membres, notamment M. Dupuis, on a décidé, sur la proposition de M. Hagerup, de supprimer la dernière phrase de l'alinéa 1er et d'ajouter dans la première les mots: "comme prisonniers de guerre" après les mots: "ne peuvent être detenus."

L'alinéa 2 de l'article 81, aux termes duquel "les passagers militaires et les passagers civils déjà enrôlés peuvent être capturés comme prisonniers de guerre, même si le navire n'est pas susceptible de confiscation", a été adopté sans modification. En autorisant la capture des passagers civils "déjà enrôlés", cette disposition n'a entendu viser que les individus incorporés dans la force armée des belligérants, c'est-à-dire non pas ceux qui à raison de leur âge sont d'après les lois de leur pays susceptibles d'être enrôlés mais seulement ceux qui se trouvent en fait entrés dans les cadres de l'armée. M. Kaufmann a déclaré au sein de la Commission: "Les mots 'passagers civils déjà enrôlés' ne comprennent pas tous les hommes qui, autant que ce'a dépend de leur âge, peuvent être enrôlés suivant les lois de leur pays, mais uniquement ceux qui, conformement aux lois de leur pays, ont été, *actuellement* enrôlés *par un acte administratif* (ordre d'appel spécial ou gênéral) sans être par ce seul acte déjà devenus ou redevenus des personnes militaires." Au sujet de cet article 81, alinéa 2, M. Paul Fauchille avait cru devoir appeler l'attention de la Commission sur l'article 144 des Instructions du 19 décembre 1912 pour les officiers de la marine française, que donne la solution suivante: "Les hommes de 18 à 50 ans, nationaux de l'État ennemi, et qui ne sont ni des passagers militaires, ni des passagers civile déjà enrôlés, ni des membres du personnel religieux, médical et hospitalier, ne

seront pas faits prisonniers de guerre, à la condition qu'ils s'engagent, sous la foi d'une promesse formelle écrite, à ne prendre pendant la durée des hostilités aucun service ayant rapport avec les opérations de la guerre." L'opinion de la Commission a été qu'on ne devait pas insérer dans le Règlement une pareille disposition. Celle-ci lui a paru excessive. Non seulement, en effet, elle regarde comme faisant partie de l'armée tous les hommes soumis par leur âge, d'après les lois de leur pays, au service militaire, c'est-à-dire, suivant la règle généralement admise, tous les hommes de 20 à 45 ans, mais elle assujettit encore aux lois de la guerre des individus que leur âge y soustrait: c'est dans des cas tout à fait exceptionnels que les hommes de 18 à 20 ans et ceux de 45 à 50 ans peuvent fournir une réserve aux forces armées; on ne saurait les traiter comme s'ils devaient la constituer normalement.

Propositions in 1913.—The Institute of International Law received from its committee both in 1912 and in 1913 a draft of a manual for war on the sea. The draft of 1913 was accompanied by a detailed report. The articles proposed in 1913 were.

SEC. V. DES DROITS ET DEVOIRS DU BELLIGÉRANTS VIS-À-VIS DES PERSONNES DE L'ENNEMI.

ART. 59. A. *Personnel des navires—Bâtiments de guerre.*—En cas de capture par l'ennemi d'un bâtiment de guerre, les combattants et les non combattants faissant partie de la force armée des belligérants ont droit au traitement des prisonniers de guerre.

ART. 60. *Navires publics au privés.*—Lorsqu'un navire ennemi public ou privé est capturé par un belligérant, les hommes de son équipage, nationaux d'un État neutre, ne sont pas faits prisonniers de guerre.

Il en est de même du capitaine et des officiers, également nationaux d'un État neutre, s'ils promettent formellement par écrit de ne pas servir sur un navire ennemi pendant la durée de la guerre.

Le capitaine, les officiers et les membres de l'équipage, nationaux de l'État ennemi, ne sont pas faits prisonniers de guerre, à condition qu'ils s'engagent, sous la foi d'une promesse formelle écrite, à ne prendre, pendant la durée des hostilités, aucun service ayant rapport avec les opérations de la guerre.

ART. 61. Les noms des individus laissés libres dans les conditions visées à l'article 60, alinéas 2 et 3, sont notifié par le belligérant capteur à l'autre belligérant. Il est interdit à ce dernier d'employer sciemment lesdits individus.

ART. 62. Toute personne faisant partie de l'équipage d'un navire public au privé ennemi est, sauf preuve contraire, présumé de nationalité ennemie.

ART. 63. Ne peuvent être retenus comme tels les membres du personnel d'un navire ennemi qui, à raison de son caractère particulier, est lui-même exempt de saisie.

ART. 64. *Personnel des navires publics ou privés qui ont pris part aux hostilités.*—Lorsqu'un navire public ou un navire privé a, directement ou indirectement, pris part aux hostilités, l'ennemi peut retenir comme prisonniers de guerre tous les membres du personnel du navire qui peuvent être considérés comme ayant pris part au fait de guerre reproché au navire.

ART. 65. *Personnel des navires publics ou privés personnellement coupable d'actes hostiles.*—Les membres du personnel d'un navire public ou d'un navire privé qui se rendent personnellement coupables d'un acte hostile envers l'ennemi peuvent être retenus par lui comme prisonniers de guerre.

The intent of these articles may be seen from the somewhat extended comment given in the report of the committee upon the several articles. There was a disposition to conform to the wording of the Hague conventions. In commenting on article 60 in regard to the paroling of the officers and crews of enemy vessels which were not ships of war, the report says:

Cet article dispose que le capitaine, les officiers et les membres de l'équipage, nationaux de l'État ennemi, ne doivent pas être faits prisonniers de guerre, s'ils s'engagent à ne prendre, pendant la duré des hostiliés, aucun service ayant rapport avec les opérations de la guerre. M. Dupuis en a réclamé la suppression, car il stipule en réalité l'*obligation* de la libération conditionelle, or cela est contraire à ce qui, à très juste titre, est admis pour la guerre terrestre par l'article 10 du Règlement de La Haye du 18 octobre 1907: l'État capteur doit être libre de juger s'il convient ou non de mettre en liberté les individus capturés comme ceux-ci doivent être libres d'accepter ou de refuser la liberté sur parole. M. Holland a fait, d'autre part, remarquer que "si l'on peut avoir confiance dans la parole des officiers, il n'en est probablement pas de même dans la parole des hommes de l'équipage". Mais la Commission a estimé, par quatre voix contre trois, qu'il y avait là, suivant l'expression de M. Strisower, une disposition "humanitaire" qu'il y avait lieu de maintenir: ce serait un recul que d'admettre à cet égard une solution différente de celle consacrée par l'article 6 de la Convention n° XI de La Haye.

Personnel of private vessels of the enemy.—Formerly the personnel of private vessels of the enemy was subject to such treatment as the opposing belligerent might

determine. A common rule before 1907 was to hold as prisoners of war those who by training or relation to the state might be immediately available for service of the enemy. In early days the crews of belligerent private vessels had often been treated with great severity, but with the growing tendency to limit hostilities to the armed forces on land and on sea there had been a drift of opinion toward liberality in the treatment of crews of captured private vessels.

In the call for the Second Hague Conference this subject was not mentioned, but it was introduced by the British delegation. Amendments were offered by other delegations. Discussion showed a remarkable unanimity of opinion in favor of very liberal treatment of the personnel of enemy private vessels. The tendency seemed to be to recognize the noncombatant persons at sea as nearly on the same footing as noncombatant persons on land. This marked a decided change from earlier practice, and one with far-reaching effects. The introductory part of the report of the committee upon these rules may well be considered:

Dans la pratique internationale actuelle, les hommes, les officiers et le capitaine composant l'équipage d'un navire de commerce ennemi capturé sont traités comme des prisonniers de guerre. Le droit de prise est, en quelque sorte, appliqué a l'équipage comme au navire lui-même, souvent même sans ce préoccuper de distinguer les sujets neutres des sujets ennemis.

Pour justifier cette manière d'agir, on invoque généralement l'intérêt du belligérant capteur à affaiblir les forces de son adversaire, en le privant d'effectifs plus ou moins destinés à servir sur les navires de guerre.

Quelqu'établie qu'elle soit, cette pratique a donné lieu, à plusieurs reprises, à des difficultés. On la critiquée, en faisant remarquer ce qu'il y avait de rigoureux à traiter comme prisonniers de guerre des particuliers qui ne participent pas aux hostilités, dont la plupart sont le pauvres gens, dont le dur métier est l'unique gagne-pain, et qui méritent autant de sollicitude que les particuliers étrangers aux armées et se trouvant sur le territoire ennemi.

Cette matière ne figurait pas au programme russe de la Conférence. La Quatrième Commission s'en est trouvée saisie par une proposition britannique (1) visant seulement les marins neu-

tres, puis par une proposition belge (2) étendant même aux marins enemis le bénéfice de la liberté.

La question, n'ayant soulevé aucune discussion devant la Commission, et la Délégation britannique ayant déclaré accepter le principe de l'amendement belge, fut renvoyé au comité d'examen.

Votre Comité a été unamime à admettre, en principe, l'adoucissement du sort des équipage dans navires ennemis inoffensifs capturés ne participant pas à la guerre, à condition de ne pas porter atteinte par là à l'intérêt légitime du belligérant capteur de ne pas voir ces équipages aller grossir les effectifs de son adversaire.

C'est dans cet esprit qu'ont été préparées les dispositions ci-après: elles posent, en principe, que les équipages des navires ennemis capturés ne sont pas faits prisonniers de guerre, mais qu'il y a lieu de subordonner, en certains cas, cette liberté à certaines conditions, en vue d'assurer au belligérant capteur le respect de ses droits dans la mesure compatible avec l'humanité. (Deuxième Conférence de la Paix, Tome III, p. 1027.)

Exemption of persons from capture.—In land warfare the exemption of persons from capture is necessarily wide. In warfare on the sea the exemption has been less extended.

The general principle is that the subjects of enemy states are enemies and the subjects of other states friends. Both these principles may be conditioned by other relations and by the conduct of the parties. On the ground of conduct persons may be combatants or noncombatants, and the tendency is to determine their treatment according as they fall in one or the other of these categories, combatants being liable to the full consequences of the war and noncombatants being, so far as possible, exempt from such consequences.

The Hague convention of 1907, respecting the laws and customs of war on land, outlines with considerable fullness the rules for the treatment of persons in time of land warfare. No such complete statement of principles has been agreed upon for treatment of persons in warfare on the sea.

The personnel of duly authorized hospital ships is exempt from capture and treatment as prisoners of war. These ships may be public hospital ships of the enemy,

private hospital ships of the enemy, or may belong to neutrals.

The personnel of ships of war is in general liable to capture and to treatment accorded to prisoners of war. Exemption under The Hague convention of 1907 for the adaptation to maritime war of the principles of the Geneva convention provides, in article 10:

> The religious, medical, and hospital staff of any captured ship is inviolable, and its members can not be made prisoners of war. On leaving the ship they take away with them the objects and surgical instruments which are their own private property.
>
> This staff shall continue to discharge its duties while necessary and can afterwards leave, when the commander in chief considers it possible.
>
> The belligerents must guarantee to the said staff when it has fallen into their hands the same allowances and pay as are given to the staff of corresponding rank in their own navy.

The treatment of the personnel of private vessels of the enemy is under The Hague convention of 1907 relative to certain restrictions with regard to the exercise of the right of capture in maritime war. These provisions are:

> ART. 5. When an enemy merchant ship is captured by a belligerent, such of its crew as are nationals of a neutral state are not made prisoners of war.
>
> The same rule applies in the case of the captain and officers likewise nationals of a neutral state, if they promise formally, in writing, not to serve in an enemy ship while the war lasts.
>
> ART. 6. The captain, officers, and members of the crew who are nationals of the enemy state are not made prisoners of war, on condition that they undertake, on the faith of a formal written promise, not to engage, while hostilities last, in any service connected with the operations of the war.
>
> ART. 7. The names of the persons left at liberty under the conditions laid down in article 5, paragraph 2, and in article 6, are notified by the belligerent captor to the other belligerent. The latter is forbidden knowingly to employ the said persons.
>
> ART. 8. The provisions of the three preceding articles do not apply to ships taking part in the hostilities.

Under this same convention it would be held that the personnel of innocently employed small coast-fishing vessels, small boats engaged exclusively in the local trade,

vessels charged with religious, scientific, or philanthropic missions would be exempt from capture and treatment as prisoners of war.

Neutral persons who actually engage in the hostilities lose their exemption as neutrals and are liable to the same treatment as belligerents under similar conditions.

Prisoners of war.—The right to capture a vessel implies a right to restrain those on board the vessel to such an extent as may make the capture effective. The degree of restraint will depend upon the character of the vessel and the relation of the persons on board to the vessel. The crew of a captured war ship would naturally be liable to restrain as prisoners of war, while a shipwrecked sailor which the warship had rescued from a foreign private vessel might be released at the earliest moment compatible with military necessity.

The early practice would make prisoners of war of the officers and crew of an enemy vessel liable to capture. The argument was that the detention as prisoners of war reduced the power of the enemy and hastened the end of the war. This practice was sanctioned by the rules of many states. A limitation was later imposed which gave neutral members of the crew exemption under certain conditions which would not affect the issue of the war. It was held, however, that as on land the men who might be capable of military service might be detained in an area occupied by military forces, so crews of captured vessels might be detained.

From this idea developed the later doctrine that was generally adopted early in the twentieth century that those who by training or otherwise were immediately available for enemy naval service might be detained as prisoners of war. As a sailor had had special training in order to become a sailor he would be of special value to the enemy and the detention of a number of these specially prepared men would weaken the enemy's resources. This argument had in the eighteenth century sometimes been applied to the crews of fishing vessels, but had gradually become obsolete.

In the Franco-Prussian War of 1870, captains and crews of captured vessels were detained as prisoners of war.

In the Spanish-American War in 1898 the passengers of captured private vessels were released, the crews and officers were given very liberal treatment when detained, though both were usually soon released unless needed as witnesses.

During the Russo-Japanese War in 1904–5 Russia generally followed the early policy of holding as prisoners of war the officers and crew of captured Japanese vessels.

Japan seems to have granted liberty to those of the officers and crew not needed as witnesses, unless they had been previously enrolled in the naval service.

Résumé.—Without going into detailed discussion of the reasons for exemption it is evident that certain classes of vessels are granted exemption from capture when they are innocently employed. The general grounds of humanity and expediency are behind these exemptions. There are also exemptions granted in treaties and conventions for special reasons as well as for general reasons. These exemptions may be applicable to all states or only to a small number of states, according to the treaty provisions. The convention in regard to treatment of fishing vessels is generally accepted, while the treaties as to mail vessels are limited to a comparatively small number of states.

The treatment of public vessels of the enemy may by general assent be more drastic than the treatment of private vessels. A ship of war may be destroyed, while a merchant ship should in general be taken to port.

The principles governing the treatment of vessels in a broad way apply to the treatment of the persons on board. The persons on board a public vessel of an enemy are supposedly in the service of the enemy vessel, and are liable to be treated accordingly, as the vessel and its personnel can not always be disassociated.

The personnel of private vessels of an enemy may usually be considered on the principles which are based on its relation to the war. These persons may be of any

nationality, and as engaged service of a private person may have no relation to the war. Similarly passengers on a vessel flying the flag of the enemy may not be and ordinarily are not involved in the war. These persons who are only remotely or not at all connected with the hostilities should not be unduly inconvenienced by the war.

At The Hague in 1907 these principles were recognized and conventions embodying some of these principles were drawn up by the conference. Some states have by decision and practice defined the rights of vessels and personnel. The treatment of certain vessels and their personnel is so well fixed that there is no need for explanation under a consideration of general rules, as in the case of cartel and hospital ships.

Considering all sources and regulations certain conclusions seem to be fairly established.

CONCLUSIONS.

(*a*) *Public vessels.*—Public vessels of the enemy may be captured or destroyed except the following when innocently employed:

1. Cartel ships designated for and engaged in exchange of prisoners.
2. Vessels engaged in scientific work.
3. Properly designated hospital ships.
4. Vessels exempt by treaty or special proclamation.

(*b*) *Days of grace for private vessels of the enemy.*—A reasonable period of grace, to be determined by each belligerent, shall be allowed for vessels of the other belligerent bound for or within the opponent's ports at the outbreak of war.

(*c*) *Private vessels.*—Private vessels of the enemy may be captured, except the following, when innocently employed:

1. Cartel ships designated for and engaged in exchange of prisoners.
2. Vessels engaged in religious, philanthropic, and scientific work.
3. Properly designated hospital ships.
4. Small coast fishing vessels.

5. Small boats employed in local trade, e. g., transporting agricultural products.

6. Vessels exempt by treaty or special proclamation.

(*d*) *Personnel of public vessels of the enemy.*—1. The personnel of public vessels which are liable to capture are liable to be made prisoners of war.

2. The personnel of enemy public vessels which are exempt from capture share in the exemption so long as innocently employed.

(*e*) *Personnel of private vessels of the enemy* (Arts. V–VIII, Hague Convention XI).—

ART. V. When an enemy merchant ship is captured by a belligerent, such of its crew as are nationals of a neutral state are not made prisoners of war.

The same rule applies in the case of the captain and officers likewise nationals of a neutral state, if they promise formally in writing not to serve on an enemy ship while the war lasts.

ART. VI. The captain, officers, and members of the crew when nationals of the enemy state are not made prisoners of war on condition that they make a formal promise in writing not to undertake, while hostilities last, any service connected with the operations of the war.

ART. VII. The names of the persons retaining their liberty under the conditions laid down in Article V, paragraph 2, and in Article VI, are notified by the belligerent captor to the other belligerent. The latter is forbidden knowingly to employ the said persons.

ART. VIII. The provisions of the three preceding articles do not apply to ships taking part in the hostilities.

(*f*) *Passengers on private vessels of the enemy.*—Innocent passengers on a private vessel of the enemy are to be accorded the utmost freedom consistent with the necessities of war.

Topic V.

IMMUNITY OF PRIVATE PROPERTY AT SEA.

Should private property at sea be exempt from capture?

CONCLUSION.

The United States may with propriety abandon the contention for the general exemption of enemy private property at sea and seek agreement upon a certain list of exemptions which meet the approval of the states of the world and which may from time to time be expanded as the sentiment for exemption becomes more general.

NOTES.

Introduction.—A decision as to the treatment of private property at sea in time of war is in certain respects fundamental. A code of rules for the conduct of maritime warfare based on the right to capture private property would be materially modified by the prohibition of this right. The strategy of war would also probably be modified. The attempts to make private property immune from capture have not yet met with success, therefore, any rules drawn up may properly concede the right of capture at sea of enemy private property. The considerations advanced in regard to the exemption of private property at sea should, however, receive attention.

United States proposition at The Hague, 1899.—Under date of June 20, 1899, the American commission at the First Hague Conference presented a communication to the conference stating that they were instructed to place before the conference the following proposition:

> The private property of all citizens or subjects of the signatory powers, with the exception of contraband of war, shall be exempt from capture or seizure on the high seas or elsewhere by the

armed vessels or by the military forces of any of the said signatory powers. But nothing herein contained shall extend exemption from seizure to vessels and their cargoes which may attempt to enter a port blockaded by the naval forces of any of the said powers. (Holls, Peace Conference at The Hague, p. 311.)

This was signed by the commission, consisting of Andrew D. White, Seth Low, Stanford Newel, A. T. Mahan, William Crozier, Frederick W. Holls.

The communication of the American commission showed that the attitude of the United States had been favorable to the exemption of private property from capture. The committee of the conference did not feel itself competent to take up the subject, but recommended that it be included in the program of a further conference. In speaking on this subject Mr. White said in behalf of the American commission:

> The commission have found several of the delegations ready to accept this proposal, and sundry others whose opinions evidently incline toward its adoption, but we have not succeeded in securing a support sufficiently unanimous to justify us in pressing the matter further during the present conference. (Ibid., 314.)

Mr. White also made quite an extended argument for the exemption, and the proposition was inserted in the form of a wish in the Final Act of the First Hague Conference, as follows:

> 5. The conference expresses the wish that the proposal, which contemplates the declaration of the inviolability of private property in naval warfare, may be referred to a subsequent conference for consideration. (Ibid., p. 379.)

Capture or destruction of enemy private property at sea.—Topic I considered at the Naval War College Conference in 1905 proposed the question, "What regulations should be made in regard to private property at sea in time of war?"

In the discussion of this topic the attitude of the United States was traced from the early days of the Republic. It was shown that the attitude of the United States had usually been in favor of the exemption of private property at sea from capture.

From the general conclusions as to the policy of capture a few citations may be made.

There is a growing opinion that the reasons for capture of the enemy's private property at sea are economic and political rather than military. The immunity to private property should not, however, be so extended as to interfere with necessary military operations. It would not be reasonable to exempt private property to such an extent as to cause the war to be of necessity prolonged or to result in greater destruction of life. Imperative military necessity, of which the superior officer on the field of action at the time must judge, must override rights of private property. The question of damages may be reserved for subsequent settlement. (International Law Topics and Discussions, 1905, p. 17.)

The equitable practice of days of grace will probably be continued. The use of improved means of communication will be extended. Privateering is abandoned. Prize money is beginning to be abolished. Land commerce is more and more developed. In time of war commerce is more easily transferred to neutral flags. The actual influence of the capture of private property does not seem to be great. The weakening of a naval force in order to pursue and capture private property is of doubtful expediency. Such considerations as these show why the tendency to guarantee the exemption of all private property at sea in time of war by an international agreement has been looked upon with increasing favor.

The proposed exemption, if it extended to all goods and property, would probably make necessary an extension of the list of contraband. Contraband as now used applies only to certain classes of goods carried by or belonging to neutrals. If enemy property is placed on the same basis as neutral property, the doctrine of contraband must be interpreted accordingly and the principles enunciated with this in view. (Ibid., p. 19.)

After lengthy discussion and considerable difference of opinion, it was found necessary in the conference of 1905 to make some special provision in regard to vessels. The brief statement was as follows:

The vessels of the enemy used in commerce may be enemy private property. Certain of these vessels may readily become of great service to the enemy. Vessels of like character, if belonging to a neutral, could not be classed as contraband. Owing to the ease with which many types of commercial vessels may be converted to warlike uses, it seems proper that such agencies of transportation should not be placed under the general exemption.

The degree of exemption to be extended to vessels may properly be left to the belligerents to determine.

Considering the general conditions of modern naval warfare and commercial relations, as well as the trend of opinion, to-

gether with the exceptional character of private vessels belonging to enemy citizens, an attempt to formulate a proper regulation in regard to the exemption of private property at sea may be considered expedient. Of course such exemption does not cover property of contraband nature, property involved in violation of blockade, property involved in unneutral service or otherwise concerned directly in the war. The regulation of exemption should apply, therefore, only to innocent property and ships.

Some such regulation in regard to vessels as the following seems to meet the requirements imposed by the above discussion and conclusions:

Innocent private ships, except belligerent vessels propelled by machinery and capable of keeping the high seas, are not liable to capture.

It may be said that the word "innocent" applies only to such private property or ships as have no direct relation to or share in the hostilities. It may be assumed that innocent belligerent goods or ships may be taken in case of military necessity, and when so taken full remuneration shall be paid, after the analogy of similar action on land. (Ibid., p. 20.)

The proposed regulation in regard to the treatment of private property at sea was:

Innocent neutral goods and ships are not liable to capture.

Innocent enemy goods and ships, except vessels propelled by machinery and capable of keeping the high seas, are not liable to capture. (Ibid., p. 20.)

United States proposition at The Hague, 1907.—In accordance with the vote of the First Hague Conference as expressed in the "wish" of the final act of the Conference, the immunity of private property at sea was included in the program of the Second Hague Conference in 1907. The subject was referred to the fourth committee, and the American proposition was in almost the same words as in 1899.

Mr. Choate, on June 28, 1907, made a long speech reviewing the attitude of the United States upon the question of inviolability of private property at sea. (Deuxième Conférence Internationale de la Paix, Tome III., pp. 750–764.) Mr. Choate, representing the American delegation, speaks of the immunity of private property at sea, saying:

This proposition involves a principle which has been advocated from the beginning by the Government of the United States and

urged by it upon other nations and which is most warmly cherished by the American people, and the President is of opinion that whatever may be the apparent specific interest of our own or of any other country for the time being, the principle thus declared is of such permanent and universal importance that no balancing of the chances of probable loss or gain in the immediate future on the part of any nation should be permitted to outweigh the considerations of common benefit to civilization which call for the adoption of such an agreement. (Deuxième Conférence Internationale de la Paix, Tome III, p. 766.)

Mr. Choate also speaks of this doctrine as "our favorite proposition," "the traditional policy of the United States," and at the same time saying, "I ought most frankly to concede that the United States has never been able to put this policy into practical operation." Mr. Choate cites the opinion of statesmen and writers in favor of exemption and argues that the reasons for exemption of private property on land apply to similar property at sea. He urges the exemption—

First, on humanitarian grounds; secondly, we place it on a ground more important still, of the unjustifiable interference with innocent and legitimate commerce, which concerns not alone the nation to which the ship belongs, but the whole civilized world. We insist upon our proposition in the third place as a direct advance toward the limitation of war to its proper province, a contest between the armed forces of the States by land and sea against each other and against the public property of the respective states engaged. And, finally, we object to the old practice and insist upon our demand for its abolition on the ground that it is now no longer necessary, and that it tends to invite war and to provoke new wars as a natural result of its continuance. (Ibid., pp. 774–775.)

Mr. Choate supports his position by arguments, some of which have a bearing upon the military significance of this doctrine of exemption:

Apart from all historical and ethical points of view, it may well be claimed that there is another strong ground in support of the immunity of private property at sea, not needed for military purposes, for which we contend. From economical considerations it is no longer worth the while of maritime nations to construct and maintain ships of war for the purpose of pursuing merchant ships which have nothing to do with the contest. The marked trend of naval warfare among all great maritime nations at the present time is to dispense with armed ships adapted to such

service, and to concentrate their entire resources upon the construction of great battleships whose encounters with those of their adversaries shall decide any contest, thus confining war as it should be, to a test of strength between the armed forces and the financial resources of the combatants on sea and land. It is probable that, if the truth were known, there has been an actual diminution by all the maritime nations in the construction of war vessels adapted to the pursuit of merchantmen, and, indeed, a sale or breaking up of such vessels which had been for some time in service. Indeed, none of the great navies now existing could afford to employ any of their great and costly ships of war or cruisers in the paltry pursuit of merchantmen scattered over the seas. The game would not be worth the candle and the expense would be more than any probable result.

This presents in another form the idea already referred to that war has come to be, as it should be, a contest between the nations engaged and not between either nation and the noncombatant citizens or individuals of the other nation, and it results from it that the noncombatant citizens should be let alone, and that no amount of pressure that can be brought to bear upon them will have any serious effect in shortening the controversy. (Ibid., p. 777.)

Of the proposition that the "most effective way of preventing war is to make it as terrible as possible," Mr. Choate, after showing that the trend of the Geneva and other conventions is in the opposite direction, says:

Of course there is no truth or sanity in such a brutal suggestion. Our duty is not to make war as horrible as possible, but to make it as harmless as possible to all who do not actually take part in it, to prevent as far as we can, to bring it to an end as speedily as we can, to mitigate its evils as far as human ingenuity can accomplish that result, and to limit the engines and instruments of war to their legitimate use—the fighting of battles and the blockading and protection of seacoasts. (Ibid., p. 778.)

Other arguments are also presented, and as these constitute what is regarded as an official statement of the position of the United States, the paragraphs concluding Mr. Choate's address may be cited:

Again, it is urged that the retention of this ancient right of capture and detention is necessary as the only means of bringing war to an end. That when you have destroyed the fleets of your enemy and conquered its armies it has no object in suing for peace as long as its commerce and its communication by transportation with other nations in the way of trade is left undisturbed.

But this seems to us to be a purely fanciful and imaginary proposition. The history of modern wars, and, in fact, of all wars, shows that the decisive victory over an enemy by the destruction of his fleets and the defeat of his armies is sure to bring about peace. The test of strength to which the parties appealed has thereby been decided and there is no further object in continuing the war.

The picking up or destruction of a few harmless and helpless merchantmen upon the sea, will have no appreciable effect in reducing the government and nation to which they belong to subjection, if the defeat of fleets and armies has not accomplished that result. Besides, there is a limit to the legitimate right of even the victor upon the seas for the time being to employ his power for purposes of destruction. Victory in naval battles is one thing, but ownership of the high seas is another. In fact, rightly considered, there is no such thing as ownership of the seas. According to the universal judgment and agreement of nations they have been and are always free seas—free for innocent and unoffending trade and commerce. And in the interest of mankind in general they must always remain so.

Again, it has been urged that the power to strike at the mercantile marine of other nations is a powerful factor in deterring them from war—that the merchants having such great interests involved, liable to be sacrificed by the outbreak of war, will do their utmost to hold their government back from provoking to or engaging in hostilities. But this, we submit, is a very feeble motive. Commerce and trade are always opposed to war, but have little to do with causing or preventing it. The vindication of national honor, accident, passion, the lust of conquest, revenge for supposed affront, are the causes of war, and the commercial interests which would be put in jeopardy by it have seldom, if ever, been persuasive to prevent it.

And as to its continuance or termination, commerce really has nothing to do with it. When the military and financial strength of one side is exhausted the war, according to modern methods, must come to an end, and the noncombatant merchants and traders have no more to do with bringing about the consummation than the clergymen and schoolmasters of a nation.

Once more, it is said that the bloodless capture of merchant ships and their cargoes is the most humane and harmless employment of military force that can be exercised, and that in view of the community of interest in commerce to which we have referred and the practice of insurance in distributing the loss, the effect of such captures upon the general sentiment and feeling of the nation to which they belong is most effective as a means of persuading their government to make peace.

But we reply that bloodless though it be it is still the extreme of oppression and injustice practiced upon unoffending and innocent individuals, and that it has no appreciable effect in reaching or compelling the action of the Government of which the sufferers are subjects.

We appeal, then, to our fellow delegates assembled here from all nations in the interest of peace, for the prevention of war, and the mitigation of its evils to take this important subject into serious consideration, to study the arguments that will be presented for and against this proposition, which has already enlisted the sympathy and support of the people of many nations, to be guided not wholly by the individual interest of the nations that they represent, but to determine what shall be for the best interest of all the nations in general and whether commerce, which is the nurse of peace and international amity, ought not to be preserved and protected, although it may require from a few nations the concession of the remnant of an ancient right, the chief value of which has long since been extinguished.

In the consideration of such a question, the interest of neutrals, who constitute at all times the great majority of the nations, ought to be first considered, and if they will declare on this occasion their adhesion to the humane and beneficent proposition which we have offered, we may rest assured that, although we may fail of unanimous agreement, such an expression of opinion will represent the general judgment of the world and will tend to dissuade those of us who may become belligerents from any further exercise of this right, which is so abhorrent to every principle of justice and fair play. (Ibid., p. 778–779.)

Replies to the American proposition, 1907.—The reception of Mr. Choate's address was most cordial, though not all the delegations were able to accept its conclusions. Some offered reasons of policy, others offered reasoned arguments. While political reasons were not supposed to influence the deliberations, it is evident that national conditions could not be disregarded.

A Colombian delegate concluded a considerable discussion of Mr. Choate's address with the following words:

Pour en finir, Messieurs, nous n'acceptons pas la proposition de M. Choate parce que nos conditions et nos circonstances ne nous permettent pas ce beau luxe en faveur des principes abstraits de la justice et de l'humanité. On peut être apôtre et chercher le martyre individuellement; quand on représente un pays, on a le devoir de défendre ses intérêts; dans le cas présent, il s'agit de politique internationale et non pas de philanthropie. (Deuxième Conférence Internationale de la Paix, Tome III, p. 792.)

M. Renault, of the French delegation, maintained that the analogy between war on land and on sea was not complete, that the disturbance of the economic life of the community by capture of merchant ships was a means of coercion which might prevent war or hasten peace, and one could not say it was in a high degree inhumane. As the ships may easily be converted into war vessels, they may constitute a potential means of defense the loss of which would hasten the close of hostilities. M. Renault was opposed to the ancient idea of prize money. He closes his address as follows:

D'autre part, c'est dans l'intérêt général de l'État en même temps que dans le leur que les armateurs et chargeurs des navires capturés ont continué leurs opérations malgré la guerre. Il ne serait donc pas juste qu'ils subissent seuls les conséquences de la capture. Aussi l'idée que l'État, dan son ensemble, doit subir les conséquences préjudiciables de la guerre non seulement en tant qu'elles se sont produites directement contre l'État lui-même et ses établissements, mais encore en tant qu'elles ont atteint les particuliers, s'affirme de plus en plus; on peut différer sur les moyens de la réaliser, mais il n'y a guère de doute sur le principe lui-même.

Si ces considérations sont, comme nous le croyons, justes, le droit de capture apparaît comme une mesure dirigée par un État belligérant contre un autre État belligérant, cette mesure faisant partie de l'ensemble des opérations par lesquelles un État s'efforce de réduire son adversaire à composition et n'ayant par elle-même aucun caractère particulier de rigueur. Il n'y a donc pas, suivant nous, de raison suffisante pour y renoncer, tant que l'entente nécessaire à laquelle nous avons fait allusion au début et à la formation de laquelle nous sommes prêts à concourir, ne se sera pas réalisée. (Ibid., p. 794.)

Sir Edward Fry, of the English delegation, said:

Je demande la parole seulement sur un sujet de nos débats. Le Délégué américain que nous venons d'entendre avec tant d'intérêt a beaucoup parlé de la cruauté de l'exercice du droit de capturer la propriété privée. A mon avis c'est un mal-entendu. Il est vrai que dans toutes les opérations de la guerre, il y a quelque chose de barbare, mais de toutes les opérations il n'y en a pas une qui soit aussi humaine que l'exercice de ce droit. Considérez, je vous prie, ces deux cas: l'un, la capture d'un vaisseau marchand sur mer; l'autre, les opérations d'une armée ennemie. Dans le premier cas, vous voyez une force majeure contre laquelle il est impossible de combattre; personne n'est tué, même personne n'est

blessé; c'est une affaire pacifique. De l'autre côté, qu'est-ce que vous voyez? Vous voyez le terrain désolé, le bétail détruit, les maisons brulées, les femmes et les enfants fuyant devant les soldats ennemis et peut-être des horreurs sur lesquelles je voudrais garder le silence. Se plaindre donc de la capture des vaisseaux marchands sur mer, et ne pas interdire la guerre sur terre, c'est choisir le plus grand des deux maux. (Ibid., p. 800.)

The delegate from the Argentine Republic took a similar position. (Ibid, p. 810.)

Position of Netherlands, 1907.—The Netherlands position in the Second Hague Conference was that it shared fully the sentiments and adhered to the principles of inviolability of private property as set forth by the American delegation:

La délégation des Pays-Bas est favorable à toute proposition établissant le principe de l'inviolabilité de la propriété privée sur mer.

Afin que la possibilité de transformer en temps de guerre des navires de commerce en croiseurs auxiliares ne puisse être un motif pour ne pas accepter ce principe, la délégation soumet aux considérations de la Commission la proposition suivante:

Aucun navire marchand ne peut être capturé par une partie belligérante pour le seul fait de naviguer sous pavillon ennemi s'il est muni d'un passeport délivré par l'autorité compétente de son pays, dans lequel passeport il est déclaré que le navire ne sera pas transformé en vaisseau de guerre ni utilisé comme tel pendant toute la durée de la guerre. (Deuxième Conférence Internationale de la Paix, Tome III, p. 1142.)

Brazil.—The Brazilian delegation was favorable to assimilating the status of private property at sea to the status of private property on land. He refers in his proposition to the articles of The Hague convention relative to the laws and customs of war on land:

B. Lorsque le capitaine d'un navire ou d'une flotte belligérante se trouvera dans la nécessité de réquisitionner, dans le cas prévu à l'article 23, lettre g, de la susmentionné convention, c'est-à-dire dans le cas où la destruction ou la saisie de ces biens lui sont commandées par les exigences les plus impérieuses de la guerre, un vaisseau de commerce ennemi, sa cargaison, ou une portion quelconque de celle-ci, la réquisition sera constatée par celui qui la fait moyennant des reçus délivrés au capitaine du vaisseau qu'on aura saisi, ou dont on aura saisi les marchandises, avec tous les détails possibles pour assurer aux parties intéressées leur droit à une juste indeminité.

C. Cette clause s'applique aux marchandises neutres, qui se trouveront au bord des vaisseaux marchands ennemis requisitionés.

Le capitane du navire ou de la flotte de guerre, qui aura déterminé la réquisition, est tenu de faire mettre à terre, dans un des ports les plus proches, les officiers et l'équipage du bâtiment saisi, avec les ressources nécessaires pour leur retour au pays auquel il appartenait.

Denmark.—Denmark was in favor of exemption if it could be by common agreement.

Belgium.—The Belgian delegate submitted a set of rules which had in view that private vessels of the enemy could be seized and retained by a belligerent, but were to be restored at the close of hostilities. The crews of such vessels were to be liberated on condition that they would take no part in the war.

France.—The French delegation, admitting that war was not for the profit of individuals and that the loss should not be borne by individuals, showed a disposition to accept the American proposition in case of unanimity. The delegation made a reasoned proposition:

Considérant que, si le droit des gens positif admet encore la légitimé du droit de capture appliqué à la propriété privée ennemie sur mer, il est éminemment désirable que, jusqu'à ce que l'entente puisse s'établir entre les États au sujet de sa suppression, l'exercice en soit subordonné à certaines modalités.

Considérant qu'il import au plus haut point que, conformément à la conception moderne de la guerre qui doit être dirigée contre les États et non contre les particuliers, le droit de prise apparaisse uniquement comme un moyen de coercition pratiqué par un État contre un autre état;

Que, dans cet order d'idées, tout bénéfice particulier au profit des agents de l'État qui exercent le droit de prise devrait être exclu et que les pertes subies par les particuliers de chef des prises devraient finalement incomber à l'État dont ils relèvent.

La Délégation française a l'honneur de proposer à la Quatrième Commission d'émettre le vœu que les états qui exerceront le droit de capture suppriment les part de prises attribuées aux équipages des bâtiments capteurs et prennent les mesures nécessaires pour que les pertes causées par l'exercice du droit de prise ne restent pas entièrement à la charge des particuliers dont les biens auront été capturés. (Ibid., p. 1148.)

Austria-Hungary.—The Austro-Hungarian delegation proposed amendments to the French form:

Animée du vif désir de voir terminer la discussion de la Quatrième Commission sur l'inviolabilité de la propriété privée ennemie sur mer par une amélioration, si légère fût-elle, de l'état actuel, et estimant que le vœu proposé par la Délégation française renferme des éléments propres à arriver à ces fins, mais tenant compte toutefois de certaines objections que ce vœu lui semble avoir rencontré de la part d'un nombre considérable des membres de cette Commission, la Délégation d'Autriche-Hongrie a l'honneur de proposer les amendements suivants dans le texte émis par la Délégation de France:

(*a*) mettre après "que les" au lieu de "États qui exerceront le droit de capture" les mots: "Puissances qui maintiennent la faculté de faire des prises";

(*b*) à la place de "prennent les mesures nécessaires" insérer les mots: "s'occupent à chercher un moyen praticable"; et

(*c*) au lieu de "du droit de prises" mettre "de cette faculté."

Résumé of The Hague propositions, 1907.—The president of the commission having the subject of the immunity of private property at sea under consideration at The Hague in 1907 was M. de Martens, a skilled and experienced Russian diplomat. He endeavored to give a résumé of the various propositions and arguments advanced before the commission. At the meeting of July 17, 1907, he spoke to the following effect:

La proposition américaine a suscité beaucoup d'autres propositions; la question a été posée en 1899, elle a été alors étudiée par la Première Conférence sous bénefice d'inventaire; huit années se sont passées depuis, on a donc eu le temps de se préparer sur la question qui semble aujourd'hui épuisée. Il est incontestable, à raison des propositions intermédiaires qui ont été déposées, que l'application du principe de l'inviolabilité de la propriété privée sur mer ne réunit pas l'unanimité des suffrages; ce n'est pas à la Commission qu'il appartient de discuter les motifs qui peuvent faire valoir les différents Gouvernements, mais il n'en est pas moins vrai qui sur cette question on rencontre des hésitations, des scruples et même des craintes. Les États ont évidemment l'appréhension d'apporter une solution dont les conséquences leur sont inconnues; d'entrer dans les ténèbres. De nombreux auteurs ont écrit sur le principe de l'inviolabilité de la propriété sur mer; ils sont loin d'être d'accord entre eux, même s'ils appartiennent au même pays. Le Président rapelle qu'on a cité l'ouvrage qu'il a écrit il y a quarante ans; il était alors le partisan con-

vaincu de l'inviolabilité, mais depuis cette longue époque il est devenu plus circonspect sur cette question délicate.

Les faits historiques qui viennent à l'appui de la thèse américaine, suggèrent quelques observations. Le traité que la Prusse signa avec les Etats-Unis on 1785 a consacré le principe de l'inviolabilité, mais il faut se rapeller que ce traité fut signé par un Roi philosophe et un Prince parmi les philosophes, qui du reste n'avaient guère d'illusions sur la portée pratique de leur accord, car ils savaient tous les deux qu'une guerre entre leurs deux pays n'était guère probable. On a encore cité une depêche qui fut addressée en 1824 à M. Mittleton, ministre des États-Unis à Pétersbourg et dans laquelle le Comte Nesselrode exprimait toute sa sympathie pour le principe de l'inviolabilité de la propriété privés sur mer.

Mais il faut prendre aussi en considération la dépêche, datant de la même époque, où le Comte Nesselrode, écrivant au Comte Pozzo di Borgo, ambassadeur de Russie à Paris, exclut l'éventualité d'un engagement ferme dans une question grosse de conséquences qu'on ne pourrait pas aisément calculer. En 1856, le Prince Gortchakoff a également exprimé son énergique sympathie pour l'abolition de la capture, mais, lui aussi, a entrevu les difficultés qu'elle suscitait.

Depuis 1785 jusqu'à aujourd'hui, le principe que discute la Commission n'a été mis qu'une fois en application, pendant la guerre entre la Prusse, l'Italie et l'Autriche en 1866. Ces Puissances ont déclaré au monde qu'il n'y aurait pas de capture des navires de commerce, mais cette guerre a été d'une si courte durée qu'elle ne peut être citée comme un précédent. L'argument le plus concluant que l'on a mis en avant a été la différence du régime qui pendant la guerre régit la propriété sur terre et la propriété sur mer, mais cet argument repose sur un malentendu. La Conférence de 1899 a fondé, pour ainsi dire, une société d'assurances mutuelles contre les abus de la force pendant la guerre sur terre; néanmoins si on les compare avec ceux de la guerre sur mer, ils sont bien plus terribles. Que le territoire soit ou ne soit pas occupé par l'ennemi, quoique le pillage soit aujourd'hui interdit, les nécessités militaires que reconnaissent les articles 47, 48, etc., de la Convention de 1899, pèsent d'un poids très lourd sur le paysan comme sur le propriétaire, elles les infligent non seulement des souffrances morales mais des souffrances matérielles que les conventions ne peuvent pas supprimer au moment où la force prime le droit même. Si l'on n'admet pas le principe de l'inviolabilité de la propriété privée sur mer, les particuliers ont de nombreux moyens pour échapper aux conséquences de la guerre; ils peuvent notamment vendre leurs navires et les reconstruire à la fin des hostilités. Leur situation deviendra bien plus favorable si l'on supprime le droit de capture; elle sera même

privilégiée, puisque leurs affaires augmenteront et se feront au détriment des entreprises continentales paralysées par l'invasion. C'est à la Commission d'examiner sous tous ses côtés la décision qu'elle va prendre en se conformant aux instructions que les Délégués ont reçues de leurs Gouvernements.

Le Président termine ainsi son discours:

Tel est, Messieurs, l'exposé impartial de toute la question sur laquelle vous allez vous prononcer. En vous présentant cet exposé des faits historiques et des considérations documentées, je n'avais nullement l'intention ni d'influencer votre vote, ni de me prononcer personnellement contre la prise en cosidération de la proposition (Annexe 10) de la Délégation des États-Unis d'Amérique. Je ne veux nullement prendre parti ni pour ni contre la proposition américaine. Mon devoir de Président de cette Commission m'imposa d'éclaircir le terrain sur lequel nous nous trouvons et de contribuer de mes faibles forces à une complète orientation sur tous les principaux faits et arguments développés devant vous sur cette très intéressante et très compliquée matière. (Ibid., p. 833–834.)

Vote at The Hague, 1907.—The vote taken at The Hague in 1907 upon the question of inviolability of private property at sea shows in a measure the modern attitude upon the subject. The subject was very fully discussed, the delegates were authorized by their Governments, and the matter had been included in the program of the Conference. Of 33 States voting, 21 States voted for the inviolability, 11 against, and 1 abstained from voting.

Those voting for were Germany (under reservations), United States, Austria, Belgium, Brazil, Bulgaria, China, Cuba, Denmark, Ecuador, Greece, Haiti, Italy, Norway, Netherlands, Persia, Roumania, Siam, Sweden, Switzerland, and Turkey.

Those voting against were Colombia, Spain, France, Great Britain, Japan, Mexico, Montenegro, Panama, Portugal, Russia, and Salvador.

Chile abstained from voting. (Ibid., p. 834.)

M. de Martens remarked that the vote was hardly decisive, considering the maritime predominance of some of the powers voting in the negative.

Upon the Brazilian proposition elaborating the assimilation of the treatment of private property at sea

to the treatment of private property on land 13 votes were in favor and 12 opposed.

The Belgian proposition, amended by the Netherlands, looking to the mitigation and definition of warfare on sea, was taken up by a vote of 23 in favor, 3 against (Great Britain, Japan, and Russia), and 2 abstentions. This was subsequently withdrawn from consideration.

The consideration of the French proposition led to no decisive action.

Conclusion as to The Hague discussion, 1907.—At The Hague in 1907 there was undoubtedly a much wider difference of opinion than many had anticipated in regard to inviolability of private property at sea.

This difference is shown in the report of M. Fromageot upon the subject. This report concludes:

> Si le maintien de l'état de choses actuel paraît devoir résulter de ceete délibération, il est permis de penser, comme l'a dit l'éminent Premier Délégué de Belgique, S. Exc. M. Beernaert, qu'une entente future n'a rien impossible. (Deuxième Conférence Internationale de la Paix, Tome I, p. 249.)

Thus it may be concluded that the powers of the world were not prepared in 1907 to accept the principle of inviolability of private property at sea.

The Brazilian proposition received some support, however, by embodiment among the wishes of the conference of the statement of the wish "that in any case the powers may apply, as far as possible, to war by sea the principles of the convention relative to the laws and customs of war on land."

From the attitude of the powers in 1907 it is evident that agreement upon the subject of inviolability of private property at sea will not be reached till other matters relating to maritime warfare are settled.

Enemy ships.—If all private property at sea except that of the nature of contraband is to be inviolable, there will be a tendency to extend the list of contraband articles.

It is presumed that the laws governing liability in regard to blockade and unneutral service will still be operative.

If, however, conversion of enemy private ships into ships of war is to be permitted on the high sea, it will be necessary for a belligerent to use great care in his conduct toward his opponent's private vessels. A private vessel of one belligerent which may be met on the high sea by the other belligerent may claim exemption on the ground that it is a private vessel, which may be the fact at the time. Shortly afterwards the private vessel may be converted into a public war vessel. It is now not only liable to capture, but also liable to be destroyed or seized, and its personnel may be made prisoners of war. As there are as yet no rules regulating reconversion, such a vessel may after a time, perhaps when capture may be expected, undergo reconversion into a private vessel and be accordingly exempt as private property.

To include vessels without exception in the exemption making private property at sea inviolable is to give an exemption after war is opened and vessels have sailed with a knowledge thereof, which is not given to vessels in a belligerent port at the outbreak of war or to vessels which have sailed without knowledge of the war bound for a belligerent port. Article V of the convention relative to the status of enemy merchant ships at the outbreak of hostilities provides that—

> The present convention does not affect merchant ships whose build shows that they are intended for conversion into war ships.

At the present time few ships are of such construction that they may not, under some circumstances, be of use for war even if not originally constructed for that service. A pleasure yacht may become useful as a scouting vessel, an ordinary privately owned collier may easily be converted into a public collier, etc.

It would seem necessary that if other innocent private property is granted exemption, it would be on the ground that the innocence can be determined from the nature of the property itself.

Goods of the nature of contraband can be determined in most cases from inspection. Whether a vessel is to be converted from private to public can not be determined

by inspection, for the physical character of the vessel may remain the same in private or in public control. The control is the main difference, and this may be transferred by radiotelegraph or even on a certain date by previous agreement, which date may not have arrived at the time when the vessel was met by the belligerent of the other flag.

Prof. Westlake's opinion.—The late Prof. Westlake, of Cambridge, in a note to Latifi's "Effects of War on Property," speaks of the commercial blockade as a war against neutrals.

> But if only sentiment can be gratified by limiting the war against the enemy's commercial flag, the war against neutrals is to continue, with the certainty that commercial blockades, when they have become the sole means of paralyzing the enemy's sea trade, will be practically carried as far as audacity can venture to strain or to violate rules.
>
> The name in which this topsy-turvy policy is advocated is that of immunity at sea of private enemy property as such, and this is asserted to be the extension to the sea of a principle admitted on land. In truth, however, the immunity of private enemy property is not admitted anywhere as absolute. It is only admitted so far as it does not interfere with any operations deemed to be useful for putting pressure on the enemy or for defense against him. (Latifi, Effects of War on Property, p. 147.)

After a considerable discussion Prof. Westlake says:

> Lastly, if it can not be maintained, either legally or as a question of political fact, that individual subjects or citizens are foreign to the wars of their State, there remains the plea urged on the ground of humanity—that they ought to be exempted as far as possible from the consequences of their solidarity. But they have to bear those consequences in land war, and in naval war the risk and loss are far more easily met and spread over the community by insurance and by the increased price of the cargoes which escape the risk.

The conclusion is:

> (1) That there is no principle, consistent with the existence and nature of war, on which a belligerent can be required to abstain from trying to suppress his enemy's commerce under his flag.
>
> (2) That between trying by commercial blockades to suppress the enemy's commerce under the neutral flag and allowing it to pass free under his own flag there is a glaring inconsistency.

(3) And that the subject is therefore open to be dealt with on the ground of the probable effects of any change in the law. (Ibid, p. 151.)

Résumé.—The wide consideration that has been given to the subject of immunity of private enemy property at sea shows that there are differences of opinion among different states and even within single states. These differences are supported by arguments which are worthy of careful consideration. It is not proved to the satisfaction of many that the exemption of private enemy property will shorten or even make war more humane. Some maintain with strong arguments that the reverse would be the result. It is certain that not all private enemy property could consistently with the ends of war be exempt from capture. It is probable that in some wars the list of free goods could be extended more than in other wars.

The United States has uniformly striven for the principle of exemption of private property at sea in time of war. The other states of the world have not been willing to adopt this principle. The United States has therefore been obliged to shape its policy in recent years accordingly and to accept the fact that other nations were not prepared to agree to exemption of private property at sea.

There are many who maintain that in war, under present conditions of fleets, the capture of private property could not be resorted to as a means of injuring the enemy, as it would be more to the disadvantage of the captor than to the belligerent from whom capture is made.

It is certain that the capture of private enemy property at sea as an object of war has become of much less importance than formerly, and the United States may regard the question as much less vital than before the twentieth century. Certain private property at sea could certainly be seized under restrictions similar to those governing seizure on land even if the doctrine of inviolability was approved. This, in fact, would result in treatment which would be about all that could be demanded if war upon the sea is to exist. There would

therefore arise, in case of the adoption of the principle of inviolability, a doctrine in regard to exception of certain classes of property from the inviolability. On the other hand, the same result is gradually being brought about by the agreement not to interfere with or not to capture certain classes of vessels or property in time of war on the sea. Perhaps the gradual enlargement of the list of exemptions may be more easy to obtain and more in accord with rational procedure than a sweeping prohibition which would be accompanied with a large list of exceptions of classes of property which would be liable to capture. The United States can consistently indorse either method of harmonizing maritime warfare with the principles of humanity, for one method of procedure may reach the goal sought as quickly as the other, and the gradual development of a list of property free from capture may be practicable with the minimum of friction and difficulty.

Conclusion.—The United States may with propriety abandon the contention for the general exemption of enemy private property at sea and seek agreement upon a certain list of exemptions which meet the approval of the states of the world and which may from time to time be expended as the sentiment for exemption becomes more general.

Topic VI.

MEANS OF INJURING THE ENEMY.

Having regard to The Hague conventions, what limits should be imposed upon the means of injuring an enemy, including the use of mines?

CONCLUSION.

Having regard to the regulations adopted at The Hague and to regulations which have seemed to meet wide approval, the following regulations in regard to means of injuring the enemy in maritime war may be suggested:

Means of injuring the enemy—

1. "The right of belligerents to the choice of means of injuring the enemy is not unlimited."

2. It is forbidden—

(*a*) To employ poison or poisoned weapons or projectiles whose sole object is the diffusion of asphyxiating or deleterious gases.

(*b*) To employ arms, projectiles, or material of a nature to cause unnecessary suffering.

3. Torpedoes and mines—

(*a*) It is forbidden to use torpedoes which do not become harmless when they have completed their run.

(*b*) It is forbidden to lay mines in the high seas except within the immediate area of belligerent operations.

(*c*) It is forbidden in the high seas and in marginal waters of the belligerent (1) to lay unanchored automatic contact mines, except when they are so constructed as to become harmless one hour at most after those who laid them have lost control of them; (2) to lay anchored automatic contact mines which do not become harmless as soon as they have broken loose from their moorings.

(*d*) A belligerent is forbidden to lay mines off the the coast or before the ports of the enemy except for strictly military or naval purposes.

It is forbidden to lay mines in order to establish or to maintain a commercial blockade.

(*e*) When mines are employed every possible precaution must be taken for the security of peaceful shipping.

The belligerents undertake to provide as far as possible that these mines shall become harmless within a limited time, and, should they cease to be under surveillance, to notify the danger zones as soon as military exigencies permit by a notice to mariners, which must also be communicated to the Governments through the diplomatic channel.

(*f*) At the close of the war the belligerent states undertake to do their utmost to remove the mines which they have laid, each state removing its own mines.

As regards anchored automatic contact mines laid by one of the belligerents off the coast of the other, their position must be notified to the other party by the state which laid them, and each state must proceed with the least possible delay to remove the mines in its own waters.

The belligerent states upon which the obligation to remove the mines falls after the end of the war should as soon as possible give notice that the mines have so far as possible been removed.

NOTES.

Restrictions on instruments of warfare.—From early days it has been customary for writers and others, from time to time, to propose restriction upon the instruments of warfare, particularly upon the introduction of new instruments. There was opposition to the introduction of the musket in the sixteenth century, and four centuries earlier objection had been raised to projectiles in general. In 1759, even, Admiral Conflans is reported to have ordered his captains not to use shells.

The rules for war on land developed earlier than those for war on the sea. These rules did not develop early, however. The perfecting of a bullet which exploded on contact with a hard substance, in Russia, in 1863, and later of one which would explode on contact with a soft substance led in 1868 to the formation of the Declaration of St. Petersburg. The declaration was the first formal international agreement restricting the means of war. The actual restriction of the use of a specified form of projectile is not now of an importance at all

commensurate with the enunciation of principles of general conduct which are set forth in the declaration:

On the proposition of the imperial cabinet of Russia an international military commission having assembled at St. Petersburg in order to examine into the expediency of forbidding the use of certain projectiles in time of war between civilized nations, and that commission having by common agreement fixed the technical limits at which the necessities of war ought to yield to the requirements of humanity, the undersigned are authorized by the orders of their Governments to declare as follows:

Considering that the progress of civilization should have the effect of alleviating as much as possible the calamities of war;

That the only legitimate object which states should endeavor to accomplish during war is to weaken the military forces of the enemy;

That for this purpose it is sufficient to disable the greatest possible number of men;

That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men or render their death inevitable;

That the employment of such arms would, therefore, be contrary to the laws of humanity;

The contracting parties engage mutually to renounce, in case of war among themselves, the employment by their military or naval troops of any projectile of a weight below 400 grams which is either explosive or charged with fulminating or inflammable substances.

The states parties to this declaration also gave evidence that they might endeavor by later concerted action "to maintain the principles which they have established" and endeavor "to conciliate the necessities of war with the laws of humanity."

An attempt to establish rules in regard to the treatment of prisoners of war and other matters in 1874 did not meet with general approval. The Geneva convention of 1864, in regard to the treatment of the wounded of armies in the field, was, however, generally accepted. During the wars of 1866 and of 1870 in Europe various statements were made that one or another party was conducting the war without regard to recognition of the principles of civilized warfare, but as there was no agreement as to what these principles were, it was impossible to establish or controvert the statements. There was a

general acknowledgment that the principles of the Geneva convention and of the declaration of St. Petersburg should be observed.

Gradually there was formulated in different states codes of laws for use in time of war, similar in some respects to Lieber's Code of 1863 in the United States. Attempts to formulate such codes by international agreement followed the establishment of the Institute of International Law in 1873. The Brussels Manual of 1874 and the Oxford Manual of 1880 are examples of such codification.

Godfrey Lushington's Manual of Naval Prize Law, prepared for the British navy in 1866, furnished a basis for subsequent codification. The Manual was revised and amplified by Prof. Holland in 1888 and has subsequently been revised.

Such codifications showed that definite statements in regard to the conduct of hostilities might be formulated. The demand for formulation and definition of rights of belligerents and of neutrals became more imperative.

Restrictions and First Hague Conference, 1899.—Besides the proposal to limitation of armaments, the Czar's circular of January 11, 1899, suggested the interdiction of new firearms, new explosives, as well as powder more powerful than then in use, the limitation of certain formidable explosives, and of the discharge of projectiles from air craft, the prohibition of submarine mines and boats, and the prohibition of the use of rams. The subjects were considered at the Conference of 1899.

The Hague convention of 1899, concerning the laws and customs of war on land, provided:

ART. 22. The right of the belligerents to adopt means of injuring the enemy is not unlimited.

This same article was reaffirmed in the conference of 1907.

Both Conferences also declared it prohibited "Art. 23 (*e*) To employ arms, projectiles, or material of a nature to cause superfluous injury." While these restrictions were drawn primarily to apply to war on land, yet it has

been maintained that the principles apply to maritime warfare.

The contracting states agreed at the Conference of 1899 "to prohibit for a term of five years the discharge of projectiles and explosives from balloons or by other new methods of a similar nature." This agreement expired while the Russo-Japanese war was in progress, but neither power took advantage of this fact. The declaration was renewed at the conference of 1907, to continue for a period extending to the close of the Third Peace Conference.

The improvement in systems of aerial navigation are so great that it is doubtful whether this declaration will be renewed. The declaration was conceived as one which would mitigate the horrors of war, in the same spirit as the Declaration of St. Petersburg of 1868. If projectiles can be discharged from balloons with no risk beyond the ordinary war risk, it is maintained that there is no reason for the prohibition of such discharge. That projectiles should not be launched from balloons against undefended or unfortified places would accord with the present laws of war and would prevail even if there were no convention in regard to balloons.

The proposition that aerial warfare be prohibited altogether, as being a first practical step toward the limitation of armaments, was not sufficiently supported to secure adoption in 1907, and since that time much effort has been devoted to the improvement of air craft. Few large states have ratified the declaration prohibiting the discharge of projectiles and explosives from balloons. Among the states that have ratified the declaration are the United States, Great Britain, and France. Like the other conventions, this declaration is not binding except among contracting states. Italy made use of air craft in the war with Turkey in Tripoli. Most of the large states have constituted aerial corps in connection with their other forces.

The Hague Conference of 1899 agreed upon a declaration prohibiting the use of projectiles, the sole object of

which is the diffusion of asphyxiating or deleterious gases.

The declaration has not been signed by the United States, though it has been signed by the other States represented at the First Hague Conference. The American delegation at the First Hague Conference, 1899, opposed this declaration, and Capt. (Admiral) Mahan states these reasons:

> These reasons were, briefly: 1. That no shell emitting such gases is as yet in practical use or has undergone adequate experiment; consequently, a vote taken now would be taken in ignorance of the facts as to whether the results would be of a decisive character or whether injury in excess of that necessary to attain the end of warfare—the immediate disabling of the enemy—would be inflicted. 2. That the reproach of cruelty and perfidy, addressed against these supposed shells, was equally uttered formerly against firearms and torpedoes, both of which are now employed without scruple. Until we knew the effects of such asphyxiating shells, there was no saying whether they would be more or less merciful than missiles now permitted. 3. That it was illogical, and not demonstrably humane, to be tender about asphyxiating men with gas, when all were prepared to admit that it was allowable to blow the bottom out of an ironclad at midnight, throwing four or five hundred into the sea, to be choked by water, with scarcely the remotest chance of escape. If, and when, a shell emitting asphyxiating gases alone has been successfully produced, then, and not before, men will be able to vote intelligently on the subject. (Holls' Peace Conference, p. 494.)

To these reasons of Admiral Mahan might be added the fact that even when projectiles may discharge gases which may be deleterious or asphyxiating, it is very difficult to prove that this is the "sole object" of the discharge. The lyddite shells which have been used diffuse asphyxiating gases, but that is not the sole object in the use of this high explosive, and its use is not regarded as contrary to law. The same has been said in regard to melinite and roburite.

Another restrictive declaration of the First Hague Conference, 1899, related to bullets with a hard envelope. In this declaration "the contracting parties agree to abstain from the use of bullets which expand or flatten easily in the human body, such as bullets with a hard en-

velope which does not entirely cover the core or is pierced with incisions."

This declaration, also, the United States has not signed, though the other 25 States represented at the Conference have signed. The United States opposed the form rather than the purpose of the declaration.

Torpedoes.—Torpedoes were objected to in early days of their use as contrary to the principles of humane warfare. It was claimed that these constituted a hidden danger, to which an enemy should not be exposed. The subject of regulation of the use of torpedoes has been generally considered with that of the use of submarine mines with which in many respects, except that of movement in a certain direction, they are similar. The discussion of the principles relating to torpedoes may, therefore, be coupled with that of mines.

Mines.—The Naval War College in 1905, International Law Topics, Topic VIII, pages 147 to 153, gave attention to the general subject of use of mines, and International Law Situations of 1908, Situation V, pages 98 to 113, gave considerable attention to the use of mines for blockading purposes. The discussion of the conference in 1908 seemed to lead to the conclusion that mines should not be used for the maintenance of a strictly commercial blockade.

Report to Hague Conference, 1907.—The reporter of the committee having in charge the question of formulation of regulations for the use of mines at The Hague in 1907 said, in regard to submarine mines:

Les principes unanimement acceptés peuvent être résumés comme suit:

(1) Il y a une distinction fondamentale à faire entre les mines automatiques de contact amarrées et les mines non-amarrées; ces dernières peuvent être employées partout, mais elles doivent être construites de façon à devenir inoffensives dans un laps de temps extrêmement limité; il doit en être de même des torpilles, qui ont manqué leur but.

(2) Quant aux mines amarrées, une limitation est nécessaire dans l'espace, c'est-à-dire concernant les lieux où il sera loisible de les placer. Mais,

(3) Comme cette limitation ne peut pas être absolue et comme, dans tous les cas, elle n'exclut pas la possibilité de placer des

mines amarrées là où la navigation pacifique doit pouvoir compter sur une libre circulation, il faut, ici encore, avoir recours à une limitation dans le temps, c'est-à-dire à une limitation du temps, pendant lequel la mine est dangereuse, ce qui serait possible, grâce aux inventions techniques modernes. On a également pu décider unanimement:

Que toute mine amarrées doit être construite de façon à devenir inoffensive dans le cas où, rompant ses amarres, elle irait flottter librement.

Par cette heureuse combinaison des limitations apportées quant à l'espace, avec les conditions techniques, que nous venons de mentionner, un progrès très sensible a été effectué sur l'état actuel des choses. A plusieurs reprises on fit notamment ressortir le grand progrès que constituerait, vis-à-vis de la situation actuelle, l'obligation d'employer des mines amarrées, qui deviennent inoffensives aussitôt qu'elles auraient rompu leurs amarres.

(4) Ces dispositions sont encore complétées par des règles, également votées à l'unanimité et établissant l'obligation des États, qui emploieraient des mines amarrées, non seulement de prendre toutes les mesures de précautions possibles, notamment en signalant les régions dangereuses (article 6) mais aussi d'enlever, à la fin de la guerre, les mines amarrées qu'on aurait placées et, en tout cas, de pourvoir, dans la mesure du possible, à ce que les mines employées deviennent inoffensives après un laps de temps limité, afin qu'elles ne restent pas dangereuses longtemps après la fin de la guerre.

(5) Enfin, des dispositions transitoires, engageant à appliquer ces règles de plus tôt possible et donnant en même temps les délais nécessaires pour la transformation du matériel existant, ainsi que le vœu de voir reprendre la question, avant l'expiration du terme, forcément assez court, pour lequel la convention pourrait être conclue ont pu rallier l'assentiment général des États représentés au Comité d'Examen. (Deuxième Conférence de la Paix, Tome III. p. 376.)

There was a marked difference of opinion in regard to the use of submarine mines, some States favoring an extreme limitation, others a wide freedom.

Germany.—The German delegation at The Hague Conference in 1907 opposed the British idea of limitation as being too strict. Marschall de Bieberstein said:

La Délégation allemande s'est vue dans le nécessité de s'opposer à une grande partie des dispositions visant à restreindre l'emploi des mines. Je tiens à expliquer en peu de mots la portée de nos réserves et notamment à défendre notre attitude contre cette interprétation qu'à l'exception des restrictions que nous acceptons, nous demandons une liberté illimitée pour l'emploi de

ces engins. Nous n'avons pas l'intention, pour me servir d'une expression de M. le Délégué de Grande-Bretagne "de semer à profusion des mines dans toutes les mers."

Ce n'est pas le cas. Nous ne sommes pas d'avis que tout ce qui n'est pas expressément prohibé, est permis.

Un belligérant qui pose des mines, assume une responsabilité très lourde envers les neutres et la navigation pacifique. Sur ce point nous sommes tous d'accord. Personne n'aura recours à ce moyen sans des raisons militaires absolument urgentes. Or, les actes militaires ne sont pas régis uniquement par les stipulations du droit international. Il y a d'autres facteurs: la conscience, le bon sens et le sentiment des devoirs imposés par les principes de l'humanité seront les guides les plus surs pour la conduite des marins et constitueront la garantie la plus efficace contre des abus. Les officiers de la marine allemande, je le dis à vois haute, rempliront toujours, de la manière la plus stricte, les devoirs qui découlent de la loi non-écrite de l'humanité et de la civilisation.

Je n'ai pas besoin de vous dire que je reconnais entièrement l'importance de la codification des règles à suivre dans la guerre. Mais il faut bien se garder d'édicter des règles dont la stricte observation pourrait être rendue impossible par la force des choses. Il est de première importance que le droit international maritime que nous voulons créer ne contienne que des clauses dont l'exécution est militairement possible, même dans des circonstances exceptionnelles. Autrement le respect du droit serait amoindri et son autorité serait ébranlée. Aussi nous paraît-il préférable de garder à présent une certaine réserve en attendant que dans cinq ans on soit mieux en mesure de trouver une solution qui soit acceptable pour tout le monde.

Mais pour donner la preuve sérieuse que la Délégation allemande contribuera volontiers à toutes les mesures acceptables qui peuvent rassurer l'opinion publique, elle se déclare prête à interdire pour cinq ans, c'est-à-dire pour la durée de cette convention, tout emploi de mines non-amarrées. Elle propose donc de remplacer l'alinéa 1 du premier article par les mots: "Il est interdit pour une durée de cinq ans de placer des mines automatiques de contact non-amarrées. (Ibid., p. 382.)

Discussion at The Hague, 1907.—The discussion at The Hague in 1907 and the votes showed a wide divergence of opinion upon the subject of regulating the use of mines. China pointed out that many ships, with their crews, had been lost in waters about China by reason of mines which had been placed during the Russo-Japanese War and that unanchored mines formed a dangerous menace to peaceful shipping.

The report of the committee said:

D'un autre côté, l'on devait se rendre compte du fait incontestable, que les mines sous-marines constituent un moyen en guerre, dont on ne saurait ni espérer ni peut-être désirer, dans l'intérêt même de la paix, la prohibition absolue: moyen surtout de défense, peu coûteux et très efficace, extrêmement utile pour protéger des côtés étendues et propre à épargner des dépenses considérables qu'exige l'entretien de grandes marines de guerre. Certes, la défense idéale des côtes, la défense qui ne peut jamais produire de dommage aux navires pacifiques, est celle que l'on obtient par des mines fixes qui éclatent au moyen de l'électricité. Mais l'emploi de pareilles mines est nécessairement limitée à la vicinité de la terre, et là encore il n'est pas toujours possible ni suffisant. C'est dire que les mines automatiques de contact sont une arme indispensable . Or, viser à une prohibition absolue de cette arme, serait par conséquent demander l'impossible; il faut se borner à en réglementer l'emploi. (Ibid., p. 398.)

Hague convention, 1907.—At the Second Hague Conference a convention was adopted relative to the laying of automatic contact submarine mines. The essential regulations of this convention are as follows:

ARTICLE I. It is forbidden:

1. To lay unanchored automatic contact mines, except when they are so constructed as to become harmless 1 hour at most after those who laid them have lost control of them;

2. To lay anchored automatic contact mines which do not become harmless as soon as they have broken loose from their moorings;

3. To use torpedoes which do not become harmless when they have missed their mark.

ART. 2. It is forbidden to lay automatic contact mines off the coast and ports of the enemy, with the sole object of intercepting commercial shipping.

ART. 3. When anchored automatic contact mines are employed, every possible precaution must be taken for the security of peaceful shipping.

The belligerents undertake to provide, as far as possible, that these mines shall become harmless within a limited time, and, should they cease to be under surveillance, to notify the danger zones as soon as military exigencies permit by a notice to mariners, which must also be communicated to the Governments through the diplomatic channel.

ART. 4. Any neutral power which lays automatic contact mines off its coasts must observe the same rules and take the same precautions as are imposed on belligerents.

The neutral power must inform mariners by a notice issued in advance, where automatic contact mines will be laid. This notice must be communicated at once to the Governments through the diplomatic channel.

ART. 5. At the close of the war the contracting powers undertake to do their utmost to remove the mines which they have laid, each power removing its own mines.

As regards anchored automatic contact mines laid by one of the belligerents off the coast of the other, their position must be notified to the other party by the power which laid them and each power must proceed with the least possible delay to remove the mines in its own waters.

ART. 6. The contracting powers which do not at present own perfected mines of the type contemplated in the present convention and which, consequently, could not at present carry out the rules laid down in articles 1 and 3, undertake to convert the matériel of their mines as soon as possible, so as to bring it into conformity with the foregoing requirements.

The report of the commission of The Hague Conference which had the matter of submarine mines under consideration admitted that it had not reached more than a tentative and conditional conclusion.

The position of the Naval War College on the use of mines, as set forth in the International Law Topics of 1905, pages 147 to 153, was presented to The Hague Conference (Deuxième Conference de la Paix, Tome III, p. 384–387). This position was stated in the War College conclusion in 1905 as follows:

1. Unanchored contact mines are prohibited, except those that by construction are rendered innocuous after a limited time, certainly before passing outside the area of immediate belligerent activities.

2. Anchored contact mines that do not become innocuous on getting adrift are prohibited.

3. If anchored contact mines be used within belligerent jurisdiction or within the area of immediate belligerent activities, due precaution shall be taken for the safety of neutrals. (International Law Topics, 1905, p. 147.)

Limitations of convention relative to submarine mines.—It should be pointed out that the convention negotiated at The Hague in 1907 places practically no restriction upon the use of mines by states which have not mines of late models which conform to the requirements of the convention. Under such circumstances it is diffi-

cult to prohibit the use of any kind of a mine by a state because no inventory of mines possessed by different states has been made.

The restriction purporting to prohibit commercial blockade by mines can be easily evaded by alleging other reasons, which might in most cases exist.

Besides, several of the great powers have made reservations in regard to this convention which limit its operation.

There is no regulation in regard to the laying of mines in straits. Straits are supposed to be open to innocent passage of neutral ships. If the area of jurisdiction of marginal sea is increased the jurisdiction over wider areas in the nature of straits is granted and a possibility of more extended use of mines arises.

Institute of International Law, 1910–13.—The Institute of International Law considered the question of regulation of the use of mines at the session at Paris in 1910 and at Madrid in 1911. The vote of the Institute finally enunciated the following articles as suitable for the regulation of the use of mines:

A.—ARTICLES VOTÉS À PARIS.

ARTICLE 1. Il est interdit de placer en plein mer des mines automatiques de contact, amarrées ou non, la question des mines à commande électrique étant réservée.

ART. 2. Les belligérants peuvent placer des mines dans leurs eaux territoriales et dans celles de l'ennemi.

Mais il leur est interdit, même dans ces eaux territoriales:

1°. De placer des mines automatiques de contact non amarrées, à moins qu'elles ne soient construites de manière à devenir inoffensives, une heure au maximum après que celui qui les a placées en aura perdue le contrôle.

2°. De placer des mines de contact amarrées qui ne deviennent pas inoffensives dès qu'elles auront rompu leurs amarres.

ART. 3. Il est interdit de faire usage, aussi bien dans les eaux territoriales qu'en pleine mer, de torpilles qui ne deviennent pas inoffensives lorsqu'elles auront manqué leur but.

ART. 4. Un belligérant ne peut placer des mines devant les côtes et les ports de son adversaire que pour des buts navals et militaires. Il lui est interdit de les y placer pour établir ou maintenir un blocus de commerce.

ART. 5. Lorsque les mines automatiques de contact, amarrées ou non amarrées, sont employées, toutes les précautions doivent être prises pour la sécurité de la navigation pacifique.

Les belligérants pourvoiront notamment à ce que les mines deviennent inoffensives après un laps de temps limité.

Dans le cas où les mines cesseraient d'être surveillées par eux, les belligérants signaleront les régions dangereuses, aussitôt que les exigences militaires le permettront, par un avis à la navigation qui devra être aussi communiqué aux Gouvernements par la voie diplomatique.

B.—ARTICLES VOTÉS À LA SESSION DE MADRID DE 1911.

ART. 6. L'État neutre peut placer des mines dans ses eaux territoriales pour la défense de sa neutralité. Il doit, en ces cas, observer les mêmes règles et prendre les mêmes précautions que celles qui sont imposées aux belligérants.

L'État neutre doit faire connaître à la navigation par un avis préalable les régions où seront placées les mines automatiques de contact. Cet avis devra être communiqué d'urgence aux Gouvernements par la voie diplomatique.

ART. 7. La question du placement de mines dans les détroits est réservée, tant en ce qui concerne les neutres que les belligérants.

ART. 8. A la fin de la guerre, les États belligérants et neutres feront tout ce qui dépend d'eux pour enlever, chacun de son côté, les mines qu'ils auront placées.

Quant aux mines automatiques de contact amarrées que l'un des belligérants aurait laissées sur les côtes de l'autre, l'emplacement en sera notifié à l'autre partie par l'État qui les aura posées, et chaque État devra procéder, dans le plus bref délai, à l'enlèvement des mines qui se trouvent dans ses eaux.

Les États belligérants et neutres auxquels incombe l'obligation d'enlever les mines après la fin de la lutte devront faire connaître la date à laquelle l'enlèvement de ces mines sera terminé.

ART. 9. La violation d'une des règles qui précèdent entraîne la responsabilité de l'État fautif.

L'État qui a posé la mine est jusqu'à preuve contraire présumé fautif.

Cette responsabilité pourra être mise en jeu, même par des particuliers, devant le tribunal international compétent. (Annuaire de Droit International, vol. 24, pp. 301, 302.)

The Institute of International Law also considered the question of regulation of the use of mines in the session of 1913. A project had been laid before the Institute in 1912 in practically the same form as the rules voted in 1911. In 1913 question was particularly raised in

regard to the text which appeared as article 8 in 1911 and as article 27 of the manual proposed in 1913.

The discussion of this article led to an amendment. The report says:

L'alinéa final disait: "Les États belligérants auxquels incombe l'obligation d'enlever les mines après la fin de la lutte devront faire connaître la date à laquelle l'enlèvement de ces mines sera terminé." Les derniers mots de cette disposition étaient amphibologiques. Quelle est exactement la notification prescrite par l'alinéa? Les États sont-ils tenus d'annoncer à l'avance que l'enlèvement des mines sera terminé d'ici tel ou tel délai; ou leur suffit-il, une fois que cet enlèvement a été terminé, de faire connaître qu'il en est ainsi? M. Hagerup a donc demandé que le texte soit corrigé de manière qu'il ne puisse plus prêter à discussion. La Commission s'est rangée à l'opinion de M. Hagerup, malgré les réserves que M. Edouard Rolin Jaequemyns a cru devoir faire sur la compétence de la Commission pour faire subir un changement à une résolution aussi récemment votée par l'Institut: elle a estimé qu'il s'agissait ici d'un éclaircissement et non d'une modification.

Quel sens convenait-il de donner au texte de l'article 27? Deux propositions ont été, à cet égard, soumises à la Commission. L'une, présentée par MM. Holland et Kaufmann, imposait aux puissances une double notification: notification pour faire connaître le commencement et le délai approximatif de l'enlèvement des mines, notification pour annoncer que l'enlèvement est effectivement terminé. L'autre, libellée par M. Hagerup, n'exigeait des Puissances qu'une seule notification, une fois que l'enlèvement des mines est terminé. C'est cette dernière proposition que la Commission a adoptée. Il lui a paru que la notification d'un délai approximatif pour l'enlèvement des mines serait plus dangereuse qu'utile: l'État qui fait connaître son intention de procéder à l'enlèvement des mines dans un certain délai ne peut, en effet, jamais savoir, à raison des difficultés inhérentes à cet enlèvement, si effectivement il aura lieu au terme indiqué: en attendant, et malgré la notification, la navigation demeurera donc périlleuse. Il serait bon, cependant, que les États ne fassent pas trop longtemps attendre l'enlèvement des mines: pour bien marquer cette idée, MM. Paul Fauchille et Hagerup avaient proposé de dire que "les États auxquels incombe l'obligation d'enlever les mines après la fin de la lutte devront faire connaître *la date* à laquelle l'enlèvement des mines *est* terminé"; en imposant l'indication de *la date*, on saura si la notification a suivi immédiatement l'enlèvement des mines et s'il a été procédé à celui-ci assez tôt après la fin de la lutte. Mais M. Edouard Rolin Jaequemyns a fait observer que les mots "*la date*" se référaient plutôt au futur qu'au passé. La Commission a, dès lors, décidé d'inscrire simplement que la

notification sera faite "dans le plus bref délai possible" et qu'elle indiquera que l'enlèvement des mines aura été terminé "dans la mesure du possible." La rédaction de l'alinéa votée par la Commission a, en conséquence, été la suivante: "Les États belligérants auxquels incombe l'obligation d'enlever les mines après la fin de la lutte devront, dans le plus bref délai possible, faire connaître que l'enlèvement de ces mines a été terminé dans la mesure du possible.

In 1911 the regulation of the use of mines controlled by electricity was reserved. In 1913 mines of this class were not mentioned.

Résumé.—The discussions at the Naval War College in previous years and printed in the International Law Situations, 1905, pages 147 to 153, and 1908, pages 98 to 113, furnish a general view of the subject. The discussions at The Hague show the views of various states and the conclusions of the Conference of 1907. The propositions before the Institute of International Law and the discussions upon these show the progress of opinion, which seems to be toward greater restrictions. The movement in this direction seems also to be sanctioned by the representations made by governments from time to time.

The general attitude seems to be that, while war must be pursued vigorously, the effects should be such as conduce to the military end and that the conduct of war should be, with all regard for life and property, consistent with military necessity. Certain rules have been generally approved; others are in the process of development.

Conclusion.—Having regard to the regulations adopted at The Hague and to regulations which have seemed to meet wide approval, the following regulations in regard to means of injuring the enemy in maritime war may be suggested:

Means of injuring the enemy:

1. "The right of belligerents to the choice of means of injuring the enemy is not unlimited."

2. It is forbidden—

(*a*) To employ poison or poisoned weapons or projectiles whose sole object is the diffusion of asphyxiating or deleterious gases.

(*b*) To employ arms, projectiles, or material of a nature to cause unnecessary suffering.

3. Torpedoes and mines:

(*a*) It is forbidden to use torpedoes which do not become harmless when they have completed their run.

(*b*) It is forbidden to lay mines in the high seas except within the immediate area of belligerent operations.

(*c*) It is forbidden in the high seas and in marginal waters of the belligerent (1) to lay unanchored automatic contact mines except when they are so constructed as to become harmless one hour at most after those who laid them have lost control of them; (2) to lay anchored automatic contact mines which do not become harmless as soon as they have broken loose from their moorings.

(*d*) A belligerent is forbidden to lay mines off the coast or before the ports of the enemy except for strictly military or naval purposes.

It is forbidden to lay mines in order to establish or to maintain a commercial blockade.

(*e*) When mines are employed every possible precaution must be taken for the security of peaceful shipping.

The belligerents undertake to provide as far as possible that these mines shall become harmless within a limited time, and, should they cease to be under surveillance, to notify the danger zones as soon as military exigencies permit by a notice to mariners, which must also be communicated to the governments through the diplomatic channel.

(*f*) At the close of the war the belligerent states undertake to do their utmost to remove the mines which they have laid, each state removing its own mines.

As regards anchored automatic contact mines laid by one of the belligerents off the coast of the other, their position must be notified to the other party by the state which laid them, and each state must proceed with the least possible delay to remove the mines in its own waters.

The belligerent states upon which the obligation to remove the mines falls after the end of the war should as soon as possible give notice that the mines have so far as possible been removed.

Topic VII.

CONVERSION OF PRIVATE VESSELS INTO PUBLIC VESSELS.

How should the conversion of private vessels into ships of war and reconversion be limited?

CONCLUSION.

Article 1. A private ship converted into a ship of war can not have the rights and duties accruing to such vessels unless it is placed under the direct authority, immediate control, and responsibility of the power whose flag it flies.

Art. 2. Private ships converted into ships of war must bear the external marks which distinguish the ships of war of their nationality.

Art. 3. The commander must be in the service of the State and duly commissioned by the competent authorities. His name must figure on the list of the officers of the fighting fleet.

Art. 4. The crew must be subject to military discipline.

Art. 5. Every private ship converted into a ship of war must observe in its operations the laws and customs of war.

Art. 6. A belligerent who converts a private ship into a ship of war must, as soon as possible, announce such conversion in the list of ships of war. (Hague Convention relative to the Conversion of Private Vessels into Public Vessels.)

Art. 7. Conversion of a private ship into a ship of war is not to take place except in the waters of its own State or of an ally or in the waters occupied by one of these.

Art. 8. A vessel converted into a ship of war retains this character to the end of the war.

Art. 9. These provisions do not apply except between contracting powers, and then only if all the belligerents are parties.

NOTES.

Conversion from private to public vessels in time of war.—The presentation of this subject as Situation VI of

the Naval War College, International Law Situations, 1912, pages 159 to 195, makes it necessary only to refer to those pages for a general account of the subject of conversion.

It is there shown that the Second Hague Conference, 1907, in the convention relative to the conversion of merchant ships into warships was concerned with the national control, evidences of character, command, discipline, conduct, and notification of conversion of a ship already converted, but not with the subject of conversion itself, the question of time, place, etc., of conversion remaining entirely outside the agreement.

At the International Naval Conference at London in 1908–9, after long discussion and many attempts, the naval powers were unable to reach an agreement. (Int. Law Situations, 1912, pp. 174–190.)

In the preliminary opinions of the members of the Institute of International Law in 1912, as at the international conferences of earlier years, there seems to be a considerable difference of opinion.

The matters already agreed upon at The Hague in 1907 seem to be generally satisfactory, though needing revision in minor particulars. The Hague rules do not, however, touch the main points of controversy, particularly the matter of the place of transfer. It seems to be generally admitted that conversion from a private vessel to a ship of war may not take place in neutral jurisdiction. It seems also to be generally admitted that such a transfer is permitted in the jurisdiction of a belligerent or of an ally in war. The main question is, therefore, in regard to conversion on the high sea. One thing is evident, that if conversion on the high sea is permitted there will be an element of uncertainty in regard to the status of some vessels. This uncertainty may lead to controversies, or, in order to avoid these, neutrals may be obliged to assume duties from which they should be free. If neutrals are burdened with additional obligations, it will be natural for them to impose more stringent regulations upon the use of their ports. This procedure might much more

than counterbalance any advantage obtained through conversion on the high sea. That rights and obligations should be definite and clear is one of the main aims of modern regulations.

Conversion from public to private vessels.—As the private vessel may receive less severe treatment than a public vessel if met at sea by an enemy, there would be an inducement to convert public vessels into private vessels whenever possible. If all innocent private property at sea, including private vessels, should be exempt from capture, the inducement might be much greater.

It has been generally argued that a belligerent would not transfer a vessel to private control in time of war except with a view to obtaining a military advantage, and in consequence such transfers should not be recognized as valid. The transfer from private to public control would probably be for military advantage, and the vessel transferred would become liable to treatment as a vessel of war. The transfer from public to private control might relieve a vessel from these risks.

Reconversion.—At The Hague Conference in 1907 it was proposed that a vessel converted from a private vessel into a public vessel should remain a public vessel during the war. This proposition was advanced by Austria-Hungary. Japan did not wish the right of reconversion to be denied, but was willing to propose that both conversion and reconversion be limited to ports under national jurisdiction. (Deuxième Conférence de la Paix, Tome III, pp. 745, 1014.)

The question of conversion and reconversion was again discussed at the International Naval Conference in 1908–9, but no agreement could be reached.

The proposition submitted for consideration of the Institute of International Law in 1912 and 1913 was:

ART. 12. Une navire militaire ne peut, tant que durent les hostilités, être transformé en navire public ou en navire privé.

Regulations proposed to Institute of International Law, 1912 and 1913.—The report presented to the Institute of

International Law in 1912 and amplified in 1913 suggests the following regulations in regard to conversion:

ART. 4. *Transformation des navires publics et privés en navires de guerre.*—Aucun navire privé transformé en navire de guerre ne peut avoir les droits et les obligations attachés à cette qualité s'il n'est placé sous l'autorité directe, contrôle immédiat et la responsabilité de la Puissance dont il porte le pavillon.

ART. 5. Les navires transformés en navires de guerre doivent porter les signes extérieurs distinctifs des navires de guerre de leur nationalité.

ART. 6. Le commandant doit être au service de l'État et dûment commissionné par les autorités compétentes; son nom doit figurer sur la liste des officiers de la flotte militaire.

ART. 7. L'équipage doit être soumis aux règles de la discipline militaire.

ART. 8. Tout navire transformé en navire de guerre est tenu d'observer dans ses opérations les lois et coutumes de la guerre.

ART. 9. Le billigérant qui transforme un navire en navire de guerre doit, le plus tôt possible, mentionner cette transformation sur la liste des bâtiments de sa flotte militaire.

ART. 10. La transformation d'un navire en navire de guerre ne peut être faite qu'en pleine mer, dans les eaux des États belligérants ou d'un État allié, ou enfin dans celles occupées par les troupes de l'un ou l'autre de ces États.

ART. 11. Le navire transformé en navire de guerre conservera ce caractère pendant la durée des hostilités, et il ne pourra pendant ce temps être à nouveau transformé en navire public ou en navire privé.

The regulations proposed to the Institute of International Law and submitted to a committee were not much changed in committee. The discussion showed that there is a growing opposition to conversion on the high sea. The committee admits that there is a general consensus favorable to permitting conversion within the waters of the belligerents or of their allies or within waters under their control. This consensus did not extend to the permission to make the open sea a place for conversion. The discussion of the subject was full and showed the drift of opinion and the main arguments upon both sides of the question. The summary of this discussion is of sufficient importance to warrant consideration:

MM. Hagerup, Holland et Edouard Rolin Jaequemyns se sont opposés à cette transformation, et cela pour un triple motif:

1°. La transformation en haute mer a quelque chose qui choque la loyauté. 2°. Elle sera une source de surprises et de dangers pour les neutres qui ont intérêt à savoir à l'avance quels navires peuvent exercer à leur égard les droits d'un belligérant. 3°. Il est difficile d'admettre qu'un navire marchand sortant d'un port neutre où il s'est ravitaillé—ce qu'il n'aurait pu faire s'il avait été un navire de geurre—puisse, aussitôt en mer, mettre à profit les avantages dont il a joui en port neutre pour se transformer et se livrer à la capture. Ces arguments n'étaient pas sans réplique: 1°. L'intérêt des neutres à connaître à l'avance de quels navires ils sont exposés à subir la visite peut être satisfait par des mesures de publicité. En temps de guerre, la plus grande circonspection s'impose, d'ailleurs, aux navires neutres. Les neutres qui transportent de la contrebande de guerre savent, au surplus, toujours à quels risques ils s'exposent. 2°. Pour empêcher qu'un navire marchand n'abuse, par sa transformation en pleine mer en bâtiment de guerre, des avantages qu'il a reçus dans un port neutre, il n'y a qu'à rendre les États neutres responsables des dommages causés par les navires dont la transformation eût été impossible sans les approvisionnements effectués en port neutre. (1) Il y a, au contraire, au point de vue des principes juridiques, un motif des plus sérieux pour admettre la transformation sur la haute mer: la transformation constitue un acte de souveraineté, or rien ne s'oppose dans la mer ouverte à l'exercice de la souveraineté des États à l'égard des navires portant leur pavillon; il faudrait des raisons très graves pour interdire au belligérant l'exécution de cet acte de souveraineté qui dans certaines occasions peut être pour lui d'une incontestable utilité. C'est ce motif que M. Strisower a longuement développé. Et son argumentation paraît avoir convaincu la Commission. En effet, M. Holland lui ayant demandé de supprimer dans l'article 10 ce qui a trait à la transformation en pleine mer, elle s'y est refusée, mais seulement par quatre voix contre trois.

Est-ce à dire que la transformation sur la haute mer ne doive pas être soumise à certaines règles spéciales? Si les arguments en faveur de la non transformation n'ont pas semblé décisifs à la Commission, ils ne lui ont pas paru, cependant, dénués absolument de valeur. Deux de ses membres se sont dès lors efforcés d'y faire droit en proposant une réglementation particulière de la transformation en pleine mer.

Afin d'empêcher qu'un navire de commerce belligérant n'abuse de l'hospitalité en port neutre pour se changer aussitôt après en bâtiment de guerre, M. Strisower a proposé qu'un délai fût fixé entre la sortie du navire hors du port neutre et le moment où il pourra se comporter en navire de guerre: la transformation faite en pleine mer ne deviendra effective qu'à l'expiration de ce délai. Il a, en conséquence, présenté le texte suivant comme second alinéa de l'article 10: "Lorsque le bâtiment a quitté un port

neutre, la transformation en pleine mer n'est valable qu'après l'écoulement d'un délai de . . . jours." Mais la motion de M. Strisower a été rejetée par trois voix contre deux et deux abstentions.

M. Paul Fauchille a, de son côté, cherché à supprimer les incertitudes dans lesquelles peuvent se trouver les neutres au regard des navires trensformés en haute mer. Dans ce but, il a saisi la Commission d'une proposition ainsi conçue: "La transformation d'un navire en pleine mer doit être notifiée aux neutres et elle ne sera valable que si le navire rencontré auquel elle est opposée a connaissance de la notification. Ce navire est censé avoir eu connaissance de la transformation s'il a quitté un port après que notification de la transformation y a été faite, ou s'il rencontre le navire transformé . . . jours après que la notification de la transformation a eu lieu." Ce texte a été adopté par la Commission par cinq voix contre une et une abstention, pour être inséré comme alinéa 2 dans l'article 10 du projet.

Summary.—As the subject of conversion of merchant ships into ships of war was so fully presented in International Law Situations, 1912, pages 159 to 195, it seems unnecessary to enlarge upon that discussion further. The rules of The Hague convention relative to the conversion of merchant ships into war ships may be taken as reasonably satisfactory for the points which it covers. Taking the provisions of this convention as a basis, the following rules may be proposed as embodying approved provisions.

Conclusion.—Regulations relative to the conversion of vessels in time of war.

Article 1. A private ship converted into a ship of war can not have the rights and duties accruing to such vessels unless it is placed under the direct authority, immediate control, and responsibility of the power whose flag it flies.

Art. 2. Private ships converted into ships of war must bear the external marks which distinguish the warships of their nationality.

Art. 3. The commander must be in the service of the state and duly commissioned by the competent authorities. His name must figure on the list of the officers of the fighting fleet.

Art. 4. The crew must be subject to military discipline.

Art. 5. Every private ship converted into a ship of war

must observe in its operations the laws and customs of war.

ART. 6. A belligerent who converts a private ship into a ship of war must, as soon as possible, announce such conversion in the list of ships of war. (Hague Convention relative to the Conversion of Private Vessels into Public Vessels.)

ART. 7. Conversion of a private ship into a ship of war is not to take place except in the water of its own state or of an ally or in the waters occupied by one of these.

ART. 8. A vessel converted into a ship of war retains its character to the end of the war.

ART. 9. These provisions do not apply except between contracting powers, and then only if all the belligerents are parties.

Topic VIII.

TRANSFER OF VESSEL FROM ENEMY TO NEUTRAL OF FLAG.

What regulations should be made in regard to the transfer of a vessel from an enemy to a neutral flag in anticipation of or in time of war?

CONCLUSION.

Articles 55 and 56 of the Declaration of London, 1909, in regard to transfer of private vessels from a belligerent to a neutral flag are in accord with modern ideas and safeguard rights of neutrals and the rights of belligerents.

ART. 55. The transfer of an enemy vessel to a neutral flag, effected before the opening of hostilities, is valid unless it is proved that such transfer was made in order to evade the consequences which the enemy character of the vessel would involve. There is, however, a presumption that the transfer is void if the bill of sale is not on board in case the vessel has lost her belligerent nationality less than 60 days before the opening of hostilities. Proof to the contrary is admitted.

There is absolute presumption of the validity of a transfer effected more than 30 days before the opening of hostilities if it is absolute, complete, conforms to the laws of the countries concerned, and if its effect is such that the control of the vessel and the profits of her employment do not remain in the same hands as before the transfer. If, however, the vessel lost her belligerent nationality less than 60 days before the opening of hostilities, and if the bill of sale is not on board, the capture of the vessel would not give a right to compensation.

ART. 56. The transfer of an enemy vessel to a neutral flag, effected after the opening of hostilities, is void unless it is proved that such transfer was not made in order to evade the consequences which the enemy character of the vessel would involve.

There is, however, absolute presumption that a transfer is void—

(1) If the transfer has been made during a voyage or in a blockaded port.

(2) If there is a right of redemption or of reversion.

(3) If the requirements upon which the right to fly the flag depends according to the laws of the country of the flag hoisted have not been observed.

NOTES.

Transfer to another flag.—The transfer of a vessel from a belligerent to a neutral was under consideration in Naval War College Conferences on International Law in 1906 and 1910.

In 1906 the following suggestions were made in regard to transfer:

(*a*) The transfer of a private vessel from a belligerent's flag during war is recognized by the enemy as valid only when bona fide and when the title has fully passed from the owner and the actual delivery of the vessel to the purchaser has been completed in a port outside the jurisdiction of the belligerent States in conformity to the laws of the State of the vendor and of the vendee. (International Law Topics and Discussiosn, 1906, p. 21.)

Declaration of London.—The subject of transfer received careful consideration at the International Naval Conference in 1908–9. The various propositions and course of the discussion is shown in Naval War College, International Law Situations, 1910, pages 108 to 128.

The rules adopted at the Naval Conference and the official report in regard to these rules is as follows:

CHAPTER V.—TRANSFER OF FLAG.

An enemy merchant vessel is liable to capture, whereas a neutral merchant vessel is spared. It may therefore be understood that a belligerent cruiser encountering a merchant vessel which lays claim to neutral nationality has to inquire whether such nationality has been acquired legitimately or for the purpose of shielding the vessel from the risks to which she would have been exposed if she had retained her former nationality. This question naturally arises when the transfer is of a date comparatively recent at the moment at which the visit and search takes place, whether the transfer may actually be before, or after, the opening of hostilities. The question will be answered differently according as it is looked at more from the point of view of commercial or more from the point of view of belligerent interests. It is fortunate that agreement has been reached on a rule which conciliates both these interests so far as possible and which informs belligerents and neutral commerce as to their position.

ARTICLE 55.

The transfer of an enemy vessel to a neutral flag, effected before the opening of hostilities, is valid, unless it is proved that such transfer was made in order to evade the consequences which the enemy character of the vessel would involve. There is, however, a presumption that the transfer is void if the bill of sale is not on board in case the vessel has lost her belligerent nationality less than 60 days before the opening of hostilities. Proof to the contrary is admitted.

There is absolute presumption of the validity of a transfer effected more than 30 days before the opening of hostilities if it is absolute, complete, conforms to the laws of the countries concerned, and if its effect is such that the control of the vessel and the profits of her employment do not remain in the same hands as before the transfer. If, however, the vessel lost her belligerent nationality less than 60 days before the opening of hostilities, and if the bill of sale is not on board, the capture of the vessel would not give a right to compensation.

The general rule laid down in the first paragraph is that the transfer of an enemy vessel to a neutral flag is valid, assuming, of course, that the ordinary legal requirements relative to validity have been fulfilled. It is for the captor, if he wishes to have the transfer annulled, to prove that the object of the transfer was to evade the consequences of the war in prospect. There is one case which is regarded as suspicious, that, namely, in which the bill of sale is not on board when the ship has changed her nationality less than 60 days before the opening of hostilities. The presumption of validity set up by the first paragraph in favor of the vessel is transposed in favor of the captor. It is presumed that the transfer is void, but proof to the contrary may be admitted. With a view to establishing the contrary, proof may be given that the transfer was not made in order to evade the consequences of the war. It is unnecessary to add that the ordinary legal requirements relative to validity must have been fulfilled.

There was a wish to give to commerce a guaranty that the right to regard a transfer as void on the ground that it was made in order to evade the consequences of war should not extend too far, and should not cover too long a period. Consequently, if the transfer has been made more than 30 days before the opening of hostilities, it can not be assailed on that ground alone, and it is regarded as unquestionably valid if it has been made under conditions which show its character is genuine and final. These are as follows: The transfer must be absolute, complete, and in conformity with the laws of the countries concerned, and its effect is to place the control of, and the profits earned by, the vessel in other hands. When once these conditions are established, the captor is not allowed to contend that the vendor foresaw the

war in which his country was about to be engaged and wished by the sale to shield himself from the risks which he would incur in respect of the vessels he was transferring. Even in this case, however, if the vessel is encountered by a cruiser and her bill of sale is not on board, she may be captured if the change of nationality has taken place less than 60 days before the opening of hostilities; that circumstance renders her suspect. But if before the prize court she furnishes the proof specified by the second paragraph, she must be released, though she can not obtain compensation, inasmuch as there was sufficient reason for capturing the vessel.

ARTICLE 56.

The transfer of an enemy vessel to a neutral flag, effected after the opening of hostilities, is void unless it is proved that such transfer was not made in order to evade the consequences which the enemy character of the vessel would involve.

There is, however, absolute presumption that a transfer is void.

(1) If the transfer has been made during a voyage or in a blockaded port.

(2) If there is a right of redemption or of reversion.

(3) If the requirements upon which the right to fly the flag depends according to the laws of the country of the flag hoisted have not been observed.

Respecting *transfer after the opening of hostilities*, the rule is more simple; the transfer is valid only if it is proved that it has not been made in order to evade the consequences which the enemy character of a vessel would involve. This is the opposite solution from that admitted for the transfer before the opening of hostilities; in that case there is a presumption that the transfer is valid; in the present, that it is void, subject to the possibility of furnishing proof to the contrary. It might be proved, for instance, that the transfer had taken place by inheritance.

Article 56 mentions cases in which the presumption of nullity is absolute, for reasons which can be readily understood. In the first case, the connection between the transfer and the war risk run by the vessel clearly appears; in the second, the transferee, one merely in name, is to be regarded as owner during a dangerous period, after which the vendor will recover his vessel; lastly, the third case might strictly be inferred, since the vessel which claims a neutral nationality must naturally prove that she has a right to that nationality.

Provision was at one time made for the case of a vessel which was retained after the transfer in the trade in which she had previously been engaged. This would be a circumstance in the highest degree suspicious; the transfer has a fictitious appearance, since nothing is changed as regards the vessel's trade. This would

apply, for instance, in case the vessel maintained the same line of sailing before and after the transfer. It was, however, objected that the absolute presumption would sometimes be too severe, as certain vessels, for example, tank ships, could, on account of their build, engage only in a definite trade. To recognize this objection the word "*route*" was added, so that it would have been necessary that the vessel should be retained *in the same trade and on the same route;* it was thought that in this way there would be given to the contention sufficient consideration. However, in consideration of the insistence on the suppression of this case from the list, its suppression has been conceded. Consequently the transfer now comes within the provision of the general rule; it is certainly presumed to be void, but proof to the contrary is admitted.

Résumé.—The discussions in International Law Situations, 1910, pages 108 to 128, showed that while the rules of the Declaration of London differed somewhat from the form proposed by the plenipotentiaries of the United States, yet the effect of the rules in operation might not differ in any marked degree.

Under the provisions of the Declaration of London the presumption in case of a transfer made before the war is wholly in favor of the one to whom transfer has been made unless the transfer has been made within 60 days and the bill of sale is not on board. The burden of proof is in the main upon the captor when the transfer is made before the opening of hostilities. In case of transfer from a belligerent to a neutral flag after the outbreak of hostilities the burden of proof is shifted to the one to whom the transfer is made to establish its validity. The rules of the Declaration of London in regard to transfer of flag have been favorably received and while their form may be somewhat involved it would seem that they should be generally approved.

Conclusion.—The articles 55 and 56 of the Declaration of London, 1909, in regard to transfer of private vessels from a belligerent to a neutral flag are in accord with modern ideas and safeguard rights of neutrals and the rights of belligerents.

ART. 55. The transfer of an enemy vessel to a neutral flag, effected before the opening of hostilities, is valid, unless it is proved that such transfer was made in order

to evade the consequences which the enemy character of the vessel would involve. There is, however, a presumption that the transfer is void if the bill of sale is not on board in case the vessel has lost her belligerent nationality less than 60 days before the opening of hostilities. Proof to the contrary is admitted.

There is absolute presumption of the validity of a transfer effected more than 30 days before the opening of hostilities if it is absoltue, complete, conforms to the laws of the countries concerned, and if its effect is such that the control of the vessel and the profits of her employment do not remain in the same hands as before the transfer. If, however, the vessel lost her belligerent nationality less than 60 days before the opening of hostilities, and if the bill of sale is not on board the capture of the vessel would not give a right to compensation.

ART. 56. The transfer of an enemy vessel to a neutral flag, effected after the opening of hostilities, is void unless it is proved that such transfer was not made in order to evade the consequences which the enemy character of the vessel would involve.

There is, however, absolute presumption that a transfer is void—

(1) If the transfer has been made during a voyage or in a blockaded port.

(2) If there is a right of redemption or of reversion.

(3) If the requirements upon which the right to fly the flag depends according to the laws of the country of the flag hoisted have not been observed.

Topic IX.

METHODS OF INJURING THE ENEMY.

What regulations should be made in regard to deceiving and injuring the enemy?

CONCLUSIONS.

The following are in general prohibited:

1. Deceit, involving perfidy.
2. To declare that no quarter will be given.
3. To declare that no flag of truce will be received.
4. To kill or wound an enemy who has surrendered and has no longer the means of defense.
5. To destroy a vessel which has surrendered before attempting to rescue those on board.

NOTES.

Treachery.—Ruses of war have always been common and are regarded as legitimate and often praiseworthy. Ruses and stratagems must not be confused with deceit involving treachery or perfidy. Treachery or perfidy in the sense used in war implies a betrayal of legitimate confidence or breaking of faith. The use of the white flag or of the Red Cross flag for purpose of attack upon an enemy would be a breach of faith. There may be a conventional or tacit agreement in regard to a course of conduct between enemies in time of war, and action contrary to such agreement would involve a breach of faith. Deceit is often resorted to and is not criticized. False reports may be circulated in regard to the position or movements of forces, but deceit not involving perfidy is usually admitted as legitimate practice.

Denial of quarter or of flag of truce.—The Hague convention respecting the laws and customs of war on land of 1907 says it is especially forbidden, "Article 23 (*d*). To declare that no quarter will be given."

Unquestionably, if this is to be read literally, it would meet general approval, because a literal reading would imply that the *declaration* that no quarter will be given is what is prohibited. Declaration that no quarter would be given was sometimes resorted to in early wars in order to deter or coerce an enemy. Several threats that no quarter would be granted were made during the American Civil War. The Brussels rules of 1874 contained the prohibition against "The declaration that no quarter will be given." The idea in these rules was to prevent threats of "extermination towards a garrison which obstinately defends a fortress." It is clear that there will be times when quarter can not be granted, as when in an attack a small part of the opposing forces offers to surrender while the remaining forces continue to fight. At such time the officer in command of the attacking force must be free to judge whether he will grant quarter to a small part of the forces or shall continue his attack on all. To accept the surrender of a few might burden the commander with prisoners to such a degree as would defeat his movement and would perhaps prolong the war and make the sacrifice greater in the end.

While a commander of forces on land or sea is forbidden "to declare that no quarter will be given," it is not thereby implied that he will in every case give quarter in time of actual operations.

The right to deny a flag of truce is granted in article 33 of The Hague convention respecting the laws and customs of war on land.

> The commander to whom a flag of truce is sent is not obliged to receive it in all circumstances.

In general the obligation, both on land and sea, would be to receive the flag of truce, but this obligation may be overridden by the military obligation to bring the operation in which the forces are engaged to a successful issue with the least sacrifice of life and property.

Prof. Oppenheim, who assisted in preparation of the British Manual of Land Warfare, says:

> As soon as an attacked or counter-attacked vessel hauls down her flag, and therefore signals that she is ready to surrender, she

must be given quarter and seized without further firing. To continue an attack, though she is ready to surrender, and to sink her and her crew would constitute a violation of customary international law and would only, as an exception, be admissible in case of imperative necessity or of reprisals. (International Law, 2d ed., Vol. II, p. 231.)

Institute of International Law, 1913.—After considering the means of injuring an enemy, the committee of the Institute of International Law in 1913 proposed a regulation as follows:

ART. 20. Il est interdit:

1° De tuer ou de blesser un ennemi qui, ayant mis bas les armes ou n'ayant plus les moyens de se défendre, s'est rendu à discrétion.

2° De couler un navire qui s'est rendu, avant d'avoir recueilli l'équipage.

3° De déclarer qu'il ne sera pas fait de quartier.

The provisions contained in this article had been the subject of much discussion before 1913. The committee, however, reports upon the article, showing some of the opinions:

Cet article, qui prévoyait pour les défendre quatre sortes de moyens de nuire, a motivé certaines remarques de la part des membres de la Commission.

En ce qui concerne le 1° de l'article, M. Holland a déclaré n'avoir aucune objection à présenter contre l'interdiction des projectiles ayant pour but unique de répandre des gaz asphyxiants ou délétères, lorsque la Déclaration de La Haye du 29 juillet 1899, qui y est relative, sera universellement acceptée par les États.

Sur le 2°, M. Kaulmann a formulé une observation qu'avait faite déjà M. de Bar. Il a demandé que, contrairement à la Déclaration de Saint-Pétersbourg du 11 décembre 1868, on autorisât les projectiles explosibles ou chargés de matières fulminantes ou inflammables d'un poids inférieur à 400 grammes "en tant qu'ils sont employés contre des aéronefs et des hydro-aéroplanes," car ces projectiles peuvent dans certains cas être les seuls qui constituent un moyen d'action efficace contre les navires de l'air. La motion de M. Kaufmann a été rejetée par trois voix contre trois abstentions. Il a paru à la Commission que son adoption aurait nécessairement comme conséquence l'abolition complète de la Déclaration de Saint-Pétersbourg, attendu qu'en fait il sera toujours impossible de savoir si les projectiles auront été dans la réalité lancés ou non sur des machines aériennes; or une pareille abolition constituerait sans conteste un retour en arrière.

M. Holland a estimé que les n^{os} 3 et 4, interdisant (3°) de tuer ou de blesser un ennemi qui s'est rendu à discrétion et (4°) de déclarer qu'il ne sera pas fait de quartier, n'étaient pas à leur place dans l'article 20. La Commission a résolu d'en faire l'objet d'un texte spécial qui serait inséré à la suite de l'article 20. Ce texte comprendra, de plus, une disposition nouvelle. M. Hagerup ayant observé que la rédaction du 3° de l'article 20 visait trop exclusivement les personnes et qu'il fallait la compléter par une autre concernant les navires, on a en effet décidé d'ajouter à l'interdiction de tuer ou de blesser un ennemi qui s'est rendu à discrétion celle " de couler un navire qui s'est rendu, avant d'avoir recueilli l'équipage."

Destruction of enemy vessels at sea.—In 1905 the conference at the Naval War College considered as Topic IV the question of the destruction of captured vessels. At that time the practice and orders of the United States and of other states were considered. The conclusions reached were as follows:

Enemy vessels.—If there are controlling reasons why enemy vessels may not be sent in for adjudication, as unseaworthiness, the existence of infectious disease, or the lack of a prize crew, they may be appraised and sold, and if this can not be done may be destroyed. The imminent danger of recapture would justify destruction, if there was no doubt that the vessel was good prize. But in all such cases all the papers and other testimony should be sent to the prize court in order that a decree may be duly entered. (International Law Topics, Naval War College, 1905, p. 62.)

Of course, there would also be the understood obligation of placing the ship's company of a private vessel in a place of safety.

French Regulations, 1912.—The French " Instructions sur l'application du Droit International en Cas de Guerre " (1912) provide for destruction of prizes taken from the enemy.

153. Les prises doivent être amarinées, conduites dans un port national ou allié, et non pas détruites.

Par exception, vous êtes autorisé à détruire toute prise dont la conservation compromettrait votre propre sécurité ou le succès de vos opérations, notamment si vous ne pouvez conserver la prise sans affaiblir votre équipage.

154. Avant la destruction, vous mettrez en sûreté les personnes, quelles qu'elles soient, qui se trouvent à bord, ainsi que tous les papiers et documents utiles pour le jugement de la prise.

155. En cas de combat provoqué par une résistance armée, ceux qui montent le vavire suivent la fortune des armes. (See Appendix.)

Résumé.—While deceit is generally allowed in war, the principle that deceit involving perfidy is prohibited is approved. Ruses not involving perfidy are allowed in both land and sea warfare. The belligerents are supposed to be on the guard against ruses, such as feigned attacks or withdrawals to lead the pursuing party into a less advantageous position.

The denial of quarter or of a flag of truce might under certain exigencies be necessary, though such cases would be few. "To declare that no quarter will be given" or that no flag of truce will be received is to return to barbaric practices and is properly prohibited in modern times.

To kill those who have no longer arms with which to engage in combat and who surrender without conditions is in the class of acts which shock the sense of modern humanity.

Similarly the destruction of a vessel which has surrendered without first removing its officers and crew would be an act contrary to the sense of right which now prevails even between enemies in time of war.

Conclusions.—The following are in general prohibited:

1. Deceit involving perfidy.
2. To declare that no quarter will be given.
3. To declare that no flag of truce will be received.
4. To kill or wound an enemy who has surrendered and has no longer the means of defense.
5. To destroy a vessel which has surrendered before attempting to rescue those on board.

APPENDIX

INSTRUCTIONS FOR THE APPLICATION OF INTERNATIONAL LAW IN CASE OF WAR

État-Major Général : 1re Section.

INSTRUCTIONS SUR L'APPLICATION DU DROIT INTERNATIONAL EN CAS DE GUERRE.

Adressées par le Ministre de la Marine, à MM. les Officiers Généraux, Supérieurs et Autres, Commandant les Forces Navales et les Bâtiments de la République.

(*Du 19 décembre 1912.*)

OBSERVATIONS GÉNÉRALES.

Dans tout le cours des présentes instructions, les expressions *capture*, *saisie*, *confiscation*, *séquestre* ont été employées avec le sens et dans le but qui vont être indiqués.

1° *Opérations effectuées par le bâtiment de guerre.*

La *capture* est l'acte purement militaire par lequel le commandant du navire de guerre substitue son autorité à celle du capitaine du navire de commerce, dispose du navire, de son équipage et de sa cargaison comme il est dit aux présentes instructions, sous réserve du jugement ultérieur du Conseil des prises quant au sort définitif du navire et de sa cargaison.

La *saisie*, lorsqu'elle s'applique aux marchandises seules, est l'acte par lequel le navire de guerre, avec ou sans l'assentiment du capitaine du navire arrêté, s'empare et dispose de ces marchandises comme il est dit aux présentes instructions, sous réserve du jugement ultérieur du Conseil des prises.

La *saisie*, lorsqu'elle s'applique au navire, diffère de la capture en ce que le sort ultérieur du navire n'est pas en cause quant à l'éventualité de sa confiscation. Il y a saisie, lorsque le navire doit être mis sous séquestre pendant la durée des hostilités ; il y a saisie, lorsque le navire doit être contraint de venir débarquer sa

marchandise illicite dans un port national ou allié, sous réserve du jugement ultérieur du Conseil des prises quant au sort de cette marchandise.

La *saisie* est toujours accompagnée des opérations d'inventaire et d'apposition des scellés.

Le mot *prise* est une expression générale s'appliquant au navire capturé ou à la marchandise saisie.

2° *Opérations effectuées par d'autres autorités que le commandant du bâtiment de guerre.*

Ces opérations sont envisagées dans les présentes instructions à titre de renseignements et pour permettre au commandant du bâtiment de guerre de régler sa conduite, dans certains cas, suivant les possibilités ultérieures de confiscation, de relaxe, de séquestre ou de saisie avec ou sans indemnité.

La *confiscation* est prononcée par le Conseil des prises en conséquence de la validation de la capture. C'est l'attribution définitive, au profit de l'État, de la propriété du navire ou de la cargaison capturée.

Le *séquestre* est l'acte par lequel le Gouvernement ou les autorités compétentes d'un port retiennent le navire et sa cargaison, soit provisoirement en vue d'un jugement ultérieur du Conseil des prises, soit pendant la durée de la guerre pour des raisons d'ordre militaire.

Article Premier.

bâtiments ennemis.[1]

1. Dès que vous avez connaissance de l'état de guerre existant entre la France et _____, soit par les ordres directs que vous avez reçus, soit par une information officielle de nos agents diplomatiques ou consulaires, soit par toute autre information indirecte mais certaine, vous êtes requis, sous la réserve des intérêts spéciaux de la mission qui vous est confiée, de courir sus à tous les bâtiments de guerre de _____, de les détruire ou de vous en emparer par la force des armes.

2. Vous êtes également requis de courir sus à tous les navires de commerce ennemis que vous rencontrerez et de les capturer.

3. Sous réserve des dispositions de l'Article XIII ci-après, relatives au transfert de pavillon, tout navire est présumé ennemi qui ne peut justifier du droit de porter un pavillon neutre.

[1] Convention III de La Haye relative à l'ouverture des hostilités.—Article V des présentes instructions (eaux territoriales neutres).—Formule I. Capture d'un navire ennemi.—Convention VI de La Haye, relative au régime des navires de commerce ennemis ou début des hostilités.

4. Exceptionnellement, vous laisserez librement passer les navires de commerce ennemis munis d'un sauf-conduit à souche, conforme au modèle annexé aux présentes instructions, constatant qu'il leur a été permis de sortir librement d'un port français après l'ouverture des hostilités pour gagner directement le port qui leur aura été désigné dans ce sauf-conduit.[1]

Vous vous assurerez que l'acte qui vous est présenté est sincère et que les conditions en ont été rigoureusement observées, particulièrement en ce qui concerne la route suivie par le navire et la composition de son équipage ou de sa cargaison.

En cas de soupçon sur l'authenticité de cet acte ou d'inexécution des conditions stipulées, vous capturerez le navire.

5. Vous laisserez librement passer les navires de commerce ennemis qui auront pris des cargaisons à destination de France ou pour compte français antérieurement à la déclaration de guerre. Vous délivrerez un sauf-conduit à ces navires qui pourront librement se rendre dans le port français que vous leur désignerez et y débarquer leur chargement.

Mais, si le lieu où vous avez rencontré lesdits navires et la route suivie par eux vous permettent de conclure qu'ils ont manifestement dévié de la route qu'ils devaient suivre d'après leurs papiers de bord, sans qu'ils y soient contraints par les circonstances de leur navigation, vous les capturerez.

6. Les navires de commerce ennemis qui ont quitté leur dernier port de départ avant le commencement de la guerre, et qui sont rencontrés en mer ignorant les hostilités, ne peuvent être capturés.

Si la réussite des opérations engagées l'exige, lesdits navires sont sujets à être saisis, moyennant l'obligation de les restituer après la guerre sans indemnité, ou à être réquisitionnés ou même à être détruits, à charge d'indemnité et sous l'obligation de pourvoir à la sécurité des personnes ainsi qu'à la conservation des papiers de bord.

Si, en particulier, la cargaison desdits navires est de nature à justifier leur saisie et leur mise sous séquestre pendant la durée des hostilités dans les conditions ci-dessus spécifiées, et s'il ne vous est pas possible de les escorter jusqu'à un port français ou allié sans que, pour cela, leur destruction soit indispensable, vous leur ordonnerez, en inscrivant cet ordre sur leur journal de bord, de se rendre eux-mêmes, pour être mis sous séquestre, dans tel port français ou allié que vous fixerez, et sous telles conditions de route et de vitesse que vous fixerez également.

Vous leur spécifierez alors qu'ils seront capturés s'ils sont ensuite rencontrés faisant route pour une destination différente ou n'ayant pas observé les conditions de votre ordre.

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[1] Formule A de sauf-conduit à souche.

7. Vous capturerez tous navires de commerce ennemis qui, dans les cas de paragraphes 5 et 6 précédents, n'auraient pas strictement observé les ordres donnés et préalablement inscrits à leur journal de bord par le commandant ou le délégué autorisé du commandant d'un navire de guerre français.

8. Vous capturerez *dans tous les cas* tous navires de commerce ennemis qui ne pourraient vous présenter des papiers de bord[1] complètement en règle et intacts ou que vous soupçonneriez spécialement d'avoir falsifié soit leur journal de bord, soit tout autre document relatif à leur route.

9. Vous capturerez *dans tous les cas* les navires de commerce enemis dont la construction indique qu'ils sont destinés à être transformés en bâtiments de guerre, ou qui sont portés sur les listes officielles de leur Gouvernement comme destinés à être transformés en bâtiments de guerre.

10. Les marchandises ennemies se trouvant à bord des navires ennemis visés aux paragraphes 5, 6, et non susceptibles d'être capturés, sont également sujettes à être saisies et restituées après la guerre sans indemnité, ou à être réquisitionnées moyennant indemnité conjointement avec le navire ou séparément.

11. En ce qui concerne la correspondance postale, vous vous conformerez aux prescriptions de l'Article XVI ci-après.

Article II.

Bateaux de pêche et navires chargés de certaines missions.[2]

12. Les navires ennemis exclusivement affectés à la pêche côtière ou à des services de petite navigation locale sont exempts de capture, ainsi que leurs engins, agrès, apparaux et chargement. Cette exemption cesse de leur être applicable dès qu'ils participent d'une façon quelconque aux hostilités.

13. Toutefois vous ne tolérerez la pêche et la petite navigation locale sur les côtes de l'ennemi que pendant le jour et qu'autant que cette faveur, dictée par un intérêt d'humanité, n'entraînerait aucun abus préjudiciable aux opérations militaires et maritimes, notamment en cas de blocus.

14. Tout navire préalablement prévenu des interdictions que vous auriez pu ainsi décider, ou provenant d'un port auquel vous auriez notifié ces interdictions, et qui ne les aurait pas observées, sera considéré par vous comme participant aux hostilités.

15. Les bâtiments chargés de mission religieuse, scientifique ou philanthropique sont également exempts de capture, sous la même réserve que ces bâtiments ne participent en aucune façon aux hostilités.

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[1] Article XV des présentes instructions (papiers de bord).

[2] XI[e] Convention de La Haye relative à certaines restrictions à l'exercice du droit de capture dans la guerre maritime.

16. Il vous est interdit de profiter du caractère inoffensif des navires français ayant les caractères susvisés pour les employer dans un but militaire en leur conservant leur apparence pacifique.

Article III.

Navires hospitaliers.—Personnel religieux, médical et hospitalier.[1]

17. Vous vous conformerez aux prescriptions de la Convention de La Haye du 18 octobre 1907 pour l'adaptation à la guerre maritime des principes de la Convention de Genève (annexe n° 9) en respectant les bâtiments hospitaliers mentionnés dans les articles 1, 2 et 3 de cette Convention et dont la liste vous est addressée par ailleurs; le tout sous réserve des droits que vous confèrent et des devoirs que vous imposent, d'une part, les articles 4, 7, 8, 9, 10, 12, 14, d'autre part, les articles 7, 8, 9, 10, 11, 16, 17 de cette même Convention. Il vous appartient d'apprécier vous-même l'opportunité d'user de vos droits dans les divers cas envisagés par ladite Convention.

Article IV.

Câbles sous-marins.[2]

18. Autant que possible, et sans nuire aux opérations principales où vous serez engagé, vous vous efforcerez de procéder à la destruction des câbles sous-marins reliant exclusivement des possessions de l'ennemi.

19. Vous respecterez les câbles qui relient exclusivement entre eux deux pays neutres.

20. Quant aux câbles qui, venant d'un pays neutre, atterrissent en territoire ennemi ou le traversent, vous les mettrez hors de service partout ailleurs que dans les eaux territoriales neutres, s'ils sont susceptibles d'être utilisés par le belligérant pour la conduite immédiate de ses opérations de guerre.

21. Dans aucun de ces cas, vous n'avez à tenir compte de la nationalité de la compagnie ou société propriétaire du câble.

Article V.

Respect des droits des États neutres.[3]

22. Vous vous conformez strictement aux interdictions imposées aux belligérants par la Convention XIII de La Haye, du 18 octo-

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[1] X[e] Convention de La Haye pour l'adaptation à la guerre maritime des principes de la Convention de Genève.

[2] Convention internationale du 14 mars 1884, concernant la protection des câbles sous-marins. (Article 15, *B. O.* 2[e] semestre 1888, p. 154.)

[3] Convention XIII de La Haye. (Droits et devoirs des Puissances neutres en cas de guerre maritime.)

bre 1907, concernant les droits et devoirs des Puissances neutres en cas de guerre maritime.

23. Pour l'application de cette Convention, vous considérerez les eaux territoriales comme ne s'étendant jamais à moins de *trois* milles des côtes, des îles ou des bancs découvrant qui en dépendent, à compter de la laisse de basse mer, et jamais au delà de la portée de canon.

Vous trouverez dans l'Annexe II le tableau des Puissances qui, soit dans un texte légal ou réglementaire, soit dans une déclaration de neutralité, ont fixé la limite de leurs eaux territoriales, quant au droit de la guerre, à une distance de la côte supérieure à trois milles.

Vous respecterez toute limite de cette nature qui se trouverait ainsi régulièrement fixée avant l'ouverture des hostilités.

Article VI.

COMMERCE DES NATIONAUX.

24. L'état de guerre entraînant l'interdiction de toutes relations de commerce entre les nations belligérantes, vous devez arrêter les navires de commerce français qui, sans justifier d'une licence, tenteraient d'enfreindre cette interdiction ou qui, plus coupables encore, chercheraient à violer un blocus ou s'engageraient dans un transport de troupes, de dépêches officielles ou de contrebande de guerre, pour le compte ou à destination de l'ennemi.

25. Les capitaines et toutes personnes soupçonnées de complicité devraient être arrêtés et remis à l'autorité judiciare française la plus proche, à l'effet d'être poursuivis, s'il y a lieu, par application des articles 77 et suitvants du Code pénal.

Article VII.

COMMERCE DES NEUTRES—CARACTÈRE NEUTRE.[1]

26. Les neutres sont auotrisés par le droit des gens à continuer librement leur commerce avec les belligérants.

Toutefois les navires neutres sont soumis au droit de visite et, éventuellement, à la capture dans les cas suivants:

1° S'ils résistent à la visite dans les conditions de l'Article XII ci-aprés;

2° S'ils transportent des objets de contrebande de guerre, dans les conditions de l'Articles VIII ci-après;

3° S'ils prêtent assistance à l'ennemi dans les conditions de l'Article IX ci-après;

4° S'ils tentent de violer un blocus dans les conditions de l'Article X ci-après.

[1] Déclaration du Congrès de Paris du 16 avril 1856. Annexe I.

27. *Caractère neutre ou ennemi.*—Sous réserve des dispositions le l'Article XIII ci-après, relativement au transfert de pavillon, le caractère d'un navire est déterminé par le pavillon qu'il a le droit de porter. (Voir Annexe II.)

Le caractère neutre ou ennemi des marchandises trouvées à bord d'un navire ennemi est déterminé par la nationalité de leur propriétaire.

Si le caractère neutre de la marchandise trouvée à bord d'un navire ennemi n'est pas établi, la marchandise est présumée ennemie.

28. Le pavillon couvre la marchandise ennemie, à l'exception de la contrebande de guerre. Vous n'avez donc point à examiner la propriété du chargement des navires neutres, mais seulement la nature de ce chargement.

Article VIII.

CONTREBANDE DE GUERRE—SORT DES NAVIRES TRANSPORTANT DE LA CONTREBANDE.

29. A moins de stipulation spéciale des traités ou de décision particulière du Gouvernement de la République, vous considérerez de plein droit comme contrebande de guerre les objets et matériaux suivants, compris sous le nom de contrebande absolue, dont la destination hostile apparaîtra comme il est dit plus loin:

1° Les armes de toute nature, y compris les armes de chasse et les pièces détachées caractérisées;

2° Les projectiles, gargousses et cartouches de toute nature et les pièces détachées caractérisées;

3° Les poudres et explosifs spécialement affectés à la guerre;

4° Les affûts, caissons, avant-trains, fourgons, forges de campagne et les pièces détachées caractérisées;

5° Les effets d'habillement et d'équipement militaires caractérisés;

6° Les harnachements militaires caractérisés de toute nature;

7° Les animaux de selle, de trait et de bât utilisables pour la guerre;

8° Le matériel de campement et les pièces détachées caractérisées;

9° Les plaques de blindage;

10° Les bâtiments et embarcations de guerre et les pièces détachées spécialement caractérisées;

11° Les instruments et appareils exclusivement faits pour la fabrication des munitions de guerre, pour la fabrication et la réparation des armes et du matériel militaire terrestre ou naval.

30. Vous ne considérerez pas comme contrebande de guerre les armes et les munitions exclusivement destinées à la défense du

bâtiment, et en la quantité que permet la coutume, à moins qu'il n'en ait été fait usage pour résister à la visite.

31. Le cas échéant, vous recevrez une liste complémentaire d'objets et de matériaux exclusivement employés à la guerre, que le Gouvernement jugerait utile, au cours des hostilités, d'ajouter aux objets de contrebande absolue énumérés ci-dessus.

32. Les articles énumérés ci-dessus sont de contrebande, s'il vous apparait qu'ils sont destinés au territoire de l'ennemi ou à un territoire occupé par lui ou à ses forces armées. Peu importe que le navire transporteur soit lui-même à destination d'un port neutre.

33. La destination ennemie de la contrebande absolue est considérée comme définitivement prouvée dans les cas suivants :

1° Lorsque la marchandise est documentée pour être débarquée dans un port de l'ennemi ou pour être livrée à ses forces armées ;

2° Lorsque, bien que la marchandise soit documentée pour un port neutre, le navire ne doit aborder qu'à des ports ennemis, ou lorsqu'il doit toucher à un port de l'ennemi, ou rejoindre ses forces armées avant d'arriver au port neutre pour lequel la marchandise est documentée.

34. Les papiers de bord font preuve complète de l'itinéraire du navire transportant de la contrebande absolue, à moins que le navire ne soit rencontré ayant manifestement dévié de la route qu'il devrait suivre d'après ses papiers de bord et sans pouvoir justifier d'une cause suffisante de cette déviation.

35. Vous considérerez de plein droit comme contrebande de guerre les objets et matériaux suivants, qui, susceptibles de servir aux usages de la guerre comme à des usages pacifiques, sont compris sous le nom de contrebande conditionelle, et dont la destination hostile apparaîtra comme il est dit plus loin, savoir :

1° Les vivres ;

2° Les fourrages et les graines propres à la nourriture des animaux ;

3° Les vêtements et les tissus d'habillement, les chaussures propres à des uages militaires ;

4° L'or et l'argent monnayé et en lingots, les papiers représentatifs de la monnaie ;

5° Les véhicules de toute nature pouvant servir à la guerre, ainsi que les pièces détachées ;

6° Les navires, bateaux et embarcations de tout genre, les docks flottants, parties de bassins, ainsi que les pièces détachées ;

7° Le matériel fixe ou roulant des chemins de fer, le matériel des télégraphes, radiotélégraphes ou téléphones ;

8° Les aérostats et les appareils d'aviation, les pièces détachées caractérisées ainsi que les accessoires, objets et matériaux caractérisés comme devant servir à l'aérostation ou à l'aviation ;

9° Les combustibles et matières lubrifiantes;

10° Les poudres et les explosifs qui ne sont pas spécialement affectés à la guerre;

11° Les fils barbelés, ainsi que les instruments servant à les fixer ou à les couper;

12° Les fers à cheval et le matériel de maréchalerie;

13° Les objets de harnachement et de sellerie;

14° Les jumelles, télescopes, chronomètres et les divers instruments nautiques.

36. Les cas échéant, vous recevrez une liste complémentaire d'objets et matériaux susceptibles de servir aux usages de la guerre comme aux usages pacifiques, que le Gouvernement jugerait utile, au cours des hostilités, d'ajouter aux objets de contrebande conditionelle énumérés ci-dessus.

37. Les articles énumérés ci-dessus sont de contrebande s'il vous apparaît qu'ils sont destinés à l'usage des forces armées ou à des administrations de l'État ennemi, à moins, dans ce dernier cas, que les circonstances n'établissent qu'en fait ces articles ne peuvent être utilisés pour la guerre en cours; cette dernière réserve ne s'applique pas à l'or et à l'argent monnayés et en lingots, ni aux papiers représentatifs de la monnaie.

38. Vous considérerez que les articles de contrebande conditionnelle ont la destination ci-dessus indiquée, si l'envoi est adressé aux autorités ennemies, ou à un commerçant établi en pays ennemi, et lorsqu'il est notoire que ce commerçant fournit au Gouvernement ennemi des objets et matériaux de cette nature. Il en est de même si l'envoi est à destination d'une place fortifiée ennemie ou d'une autre place servant de base d'opérations o ude ravitaillement aux forces armées ennemies.

39. Si, sans en pouvoirs trouver la preuve complète, vous avez cependant des raisons suffisantes de croire que les articles de contrebande conditionnelle, dont le déchargement doit avoir lieu en territoire ennemi ou occupé par l'ennemi, ont la destination hostile ci-dessus indiquée, vous pourrez saisir le navire porteur de cette contrebande.

40. A défaut des présomptions ci-dessus, la destination est présumée innocente.

41. Les articles dits "de contrebande conditionnelle" n'ont le caractère de contrebande que si le navire transporteur fait route vers le territoire de l'ennemi ou vers un territoire occupé par lui ou vers ses forces armées, et s'il ne doit pas les décharger dans un port intermédiaire neutre.

42. Toutefois, si le territoire de l'ennemi n'a pas de frontière maritime, les articles ci-dessus ont le caractère de contrebande par le seul fait de leur propre destination hostile, encore que le navire transporteur ait lui-même une destination neutre.

43. Les papiers de bord font preuve complète de l'itinéraire du navire ainsi que du lieu de déchargement des marchandises, à moins que ce navire ne soit rencontré ayant manifestement dévié de la route qu'il devait suivre d'après ses papiers de bord et sans pouvoir justifier d'une cause suffisante de cette déviation.

44. Les objets et matériaux qui ne sont pas compris dans les deux listes ci-dessus de contrebande absolue ou de contrebande conditionnelle, ou qui ne vous auraient pas été notifiés comme devant y être ajoutés, ne sont pas contrebande de guerre.

45. Ne sont jamais contrebande de guerre les articles suivants, savoir :

1° Le coton brut, les laines, soies, jutes, lins, chanvres bruts, et les autres matières premières des industries textiles ainsi que leurs filés ;

2° Les noix et graines oléagineuses, le coprah ;

3° Les caoutchoucs, résines, gommes et laques, le houblon ;

4° Les peaux brutes, les cornes, os et ivoires ;

5° Les engrais naturels et artificiels, y compris les nitrates et les phosphates pouvant servir à l'agriculture ;

6° Les minerais ;

7° Les terres, les argiles, la chaux, la craie, les pierres y compris les marbres, les briques, ardoises et tuiles ;

8° Les porcelaines et verreries ;

9° Le papier et les matières préparés pour sa fabrication ;

10° Les savons, couleurs, y compris les matières exclusivement destinées à les produire, et les vernis ;

11° L'hypochlorite de chaux, les cendres de soude, la soude caustique, le sulfate de soude en pains, l'ammoniaque, le sulfate d'ammoniaque et le sulfate de cuivre ;

12° Les machines servant à l'agriculture, aux mines, aux industries textiles et à l'imprimerie ;

13° Les pierres précieuses, les pierres fines, les perles, la nacre et les coraux ;

14° Les horloges, pendules et montres, autres que les chronomètres ;

15° Les articles de mode et les objets de fantaisie ;

16° Les plumes de tout genre, les crins et soies ;

17° Les objets d'ameublement et d'ornement, les meubles et accessoires de bureau.

46. Ne sont pas non plus considérés comme contrebande de guerre :

1° Les objets et matériaux servant exclusivement à soigner les malades et les blessés. Toutefois, en cas de nécessité militaire importante, vous pourrez les réquisitionner, moyennant une indemnité s'ils sont destinés au territoire de l'ennemi ou à un territoire occupé par lui ou à ses forces armées ;

2° Les objets et matériaux destinés à l'usage du navire où ils sont trouvés, ainsi qu'à l'usage de l'équipage et des passagers de ce navire pendant la traversée.

SORT DES NAVIRES TRANSPORTANT DE LA CONTREBANDE.

47. Vous ne saisirez pas un navire en raison d'un transport de contrebande qu'il aurait antérieurement effectué et actuellement achevé.

48. Le navire transportant des articles saisissables comme contrebande peut être saisi ou capturé par vous pendant tout le cours de son voyage, même s'il a l'intention de toucher à un port d'escale avant d'atteindre la destination ennemie.

49. Vous capturerez le navire transportant de la contrebande si cette contrebande forme, soit par sa valeur, soit par son poids, soit par son volume, soit par son fret, plus de la moitié de la cargaison.

50. Vous vous bornerez à saisir le navire transportant de la contrebande si cette contrebande est en proportion inférieure à celle ci-dessus indiquée.

51. Suivant les circonstances, vous pourrez autoriser à continuer sa route un navire arrêté pour cause de contrebande et non susceptible de confiscation à raison de la proportion de la contrebande, si le capitaine est prêt à vous livrer cette contrebande.

La remise de la contrebande sera mentionnée sur le livre de bord du navire arrêté, et le capitaine de ce navire devra vous remettre copie certifiée conforme de tous papiers utiles.

52. Vous aurez la faculté de détruire la contrebande qui vous sera ainsi livrée. (Voir Art. XXIX.)

53. Si vous rencontrez en mer un navire naviguant dans l'ignorance des hostilités ou de la déclaration de contrebande applicable à son chargement, vous pourrez néanmoins saisir ces articles de contrebande ; mais, la confiscation de ces articles, pouvant ultérieurement donner lieu à une indemnité, vous aurez soin de dresser un procès-verbal très précis en nature, poids et valeur des marchandises ainsi saisies. Dans ce cas, le navire et le surplus de sa cargaison, tout en étant sujets à être saisis, seront exempts de confiscation. Il en sera de même si le capitaine, après avoir eu connaissance de l'ouverture des hostilités ou de la déclaration de contrebande, n'a pu encore décharger les articles de contrebande.

54. Le navire est réputé connaître l'état de guerre ou la déclaration de contrebande, lorsqu'il a quitté un port ennemi après l'ouverture des hostilités ou lorsqu'il a quitté un port neutre après que la notification de l'ouverture des hostilités ou de la déclaration de contrebande a été faite en temps utile à la Puissance dont relève ce port.

Article IX.

ASSISTANCE HOSTILE.

55. Vous capturerez tout navire neutre:

1° S'il voyage spécialement en vue du transport de passagers individuels incorporés dans la force armée de l'ennemi ou en vue de la transmission de nouvelles dans l'intérêt de l'ennemi;

2° S'il vous apparaît que c'est à la connaissance soit du propriétaire, soit de celui qui a affrété le navire en totalité, soit du capitaine, qu'il transporte un détachement militaire de l'ennemi ou une ou plusieurs personnes qui, pendant le voyage, prêtent une assistance directe aux opérations de l'ennemi.

56. Dans les deux cas spécifiées ci-dessus, le navire sera passible de confiscation et, d'une manière générale, passible du traitement que subirait le navire neutre sujet à confiscation pour contrebande de guerre.

57. Toutefois les dispositions du paragraphe 54, alinéa 2°, ne s'appliquent pas si, lorsque le navire est rencontré en mer, il ignore les hostilités ou si le capitaine, après avoir appris l'ouverture des hostilités, n'a pu encore débarquer les personnes transportées.

58. Le navire est réputé connaître létat de guerre, lorsqu'il a quitté un port ennemi après l'ouverture des hostilités ou un port neutre postérieurement à la notification en temps utile de l'ouverture des hostilités à la puissance dont relève ce port.

59. Alors même qu'il n'y aurait pas lieu de capturer le navire, vous pourrez faire prisonnier de guerre tout individu incorporé dans la force armée de l'ennemi et qui sera trouvé à bord d'un navire de commerce neutre.

Vous demanderez tout d'abord au capitaine du navire de vous remettre ces individus. En cas de refus de sa part, vous passerez outre et vous les ferez prisonniers de guerre. En cas de résistance de la part du personnel du navire, vous capturerez le navire.

60. Le personnel religieux, médical et hospitalier ennemi trouvé à bord d'un navire de commerce neutre ne peut être fait prisonnier de guerre; mais, avant de laisser libre ce personnel, vous vous assurerez avec soin de la réalité de son caractère. En cas de doute, vous pourrez le retenir dans la forme ci-dessus indiquée jusqu'à ce que la preuve de ce caractère soit établie.

61. Vous capturerez également tout navire neutre;

1° Lorsqu'il prend une part directe aux hostilités;

2° Lorsqu'il se trouve sous les ordres ou sous le contrôle d'un agent placé à bord par le Gouvernement ennemi;

3° Lorsqu'il est affrété en totalité ou en partie par le Gouvernement ennemi;

4° Lorsqu'il est actuellement et exclusivement affecté soit au transport de troupes ennemies, soit à la transmission de nouvelles dans l'intérêt de l'ennemi.

62. Dans les quatre cas ci-dessus spécifiés, le navire sera passible de confiscation et, d'une manière générale, passible du traitement qu'il subirait s'il était navire de commerce ennemi.

63. Vous remarquerez que le transport des dépêches officielles ne peut être incriminé que s'il est fait à titre spécial; dans le cas contraire, vous vous conformerez aux dispositions de l'Article XVI ci-après.

Article X.

BLOCUS—ÉTABLISSEMENT D'UN BLOCUS.

64. Le blocus doit être limité aux ports et aux côtes de l'ennemi ou occupés par lui.

65. Les forces bloquantes ne doivent pas barrer l'accès aux ports et aux côtes neutres.

66. Conformément à la Déclaration de Paris, le blocus, pour être obligatoire, doit être effectif, c'est-à-dire maintenu par une force suffisante pour interdire réellement l'accès du littoral à l'ennemi.

67. Le blocus, pour être obligatoire, doit être déclaré conformément au paragraphe 68 et notifié conformément aux paragraphes 69 et 77.

68. Si, en l'absence d'une déclaration de blocus faite par le Gouvernement lui-même, vous êtes appelé à établir un blocus de votre propre initiative, vous devez préalablement faire une déclaration précisant:

1° La date du commencement du blocus;

2° Les limites géographiques du littoral bloqué, expressément désignées en latitude et longitude;

3° Le délai de sortie à accorder aux navires neutres.

69. Dans tous les cas, l'établissement d'un blocus devra également faire l'objet d'une notification formelle aux autorités des points bloqués. Cette notification, dont vous trouverez le modèle à l'Annexe III, sera envoyée à ces autorités, en même temps qu'au consul de l'une des Puissances neutres, au moyen d'un parlementaire.

70. Le cas échéant, vous feriez connaître, par la voie la plus rapide, toute disposition prise de votre propre initiative pour l'établissement d'un blocus, afin de me permettre de compléter, dans le plus bref délai, votre notification aux autorités locales par une notification aux Puissances neutres par la voie diplomatique.

71. Il conviendra de remplir les mêmes formalités si le blocus vient à être étendu à quelque nouveau point de la côte, ou est repris après avoir été levé.

72. Le blocus n'est pas considéré comme levé si, par suite de mauvais temps, les forces bloquantes se sont momentanément éloignées.

73. La levée volontaire du blocus, ainsi que toute restriction qui y serait apportée, doit être notifiée dans la même forme que ci-dessus.

Violation de blocus.

74. La violation d'un blocus ainsi établi résulte aussi bien de la tentative de pénétrer dans le lieu bloqué que de celle d'en sortir après la notification du blocus, à moins, dans ce cas, que ce ne soit dans le délai fixé et expressément mentionné dans la déclaration de blocus, délai qui devra être suffisant pour protéger la navigation et le commerce de bonne foi.

75. La saisissabilité d'un navire neutre pour violation de blocus est subordonnée à la connaissance réelle ou présumée du blocus.

76. La connaissance du blocus est, sauf preuve contraire, présumée lorsque le navire a quitté un port neutre postérieurement à la notification, en temps utile, du blocus à la Puissance dont relève ce port.

77. Si le navire qui approche du port bloqué n'a pas connu ou ne peut être présumé avoir connu l'existence du blocus, la notification doit être faite au navire même par un officier de l'un des bâtiments de la force bloquante. Cette notification doit être portée sur le livre de bord avec indication de la date et de l'heure ainsi que de la position géographique du navire à ce moment.

78. Tout navire qui force un blocus doit être capturé, fût-il neutre, allié ou national, sous réserve, à l'encontre de ce dernier, de l'application des lois pénales édictées contre ceux qui entretiennent des intelligences avec l'ennemi.

79. Toutefois aucune saisie ne peut être pratiquée à l'égard d'un navire qui, après avoir forcé le blocus, a gagné la haute mer et dont la chasse a été abandonnée.

80. Tout navire qui, après avoir reçu l'avertissement réglementaire, ne s'éloigne pas franchement et est surpris louvoyant autour de la côte bloquée, dans le rayon d'action de la force bloquante, devient suspect de fraude et peut être capturé.

81. Un navire neutre, en cas de détresse constatée par une autorité des forces bloquantes, peut pénétrer dans la localité bloquée et en sortir ultérieurement, à la condition de n'y avoir laissé ni pris aucun chargement.

82. Vous pourrez accorder à des navires de guerre la permission d'entrer dans un port bloqué et d'en sortir ultérieurement.

83. Vous capturerez tout navire reconnu coupable de violation de blocus. Ce navire sera passible de confiscation.

84. La violation du blocus est insuffisamment caractérisée pour autoriser la capture du navire, lorsque celui-ci est actuellement dirigé vers un port non bloqué, quelle que soit la destination ultérieure du navire ou de son chargement.

Article XI.

DROIT DE VISITE.

85. Vous avez le droit de visiter tous les navires de commerce que vous rencontrerez. Vous ne visiterez les paquebots postaux qu'en cas de nécessité, ainsi qu'il est dit à l'Article XVII.

86. Toutefois, suivant les circonstances, notamment suivant les parages où vous vous trouverez, ou suivant l'éloignement du théâtre des opérations, il peut arriver que vous ayez des motifs de supposer que la visite ne peut entraîner aucune saisie. Dans ce cas, l'exercice du droit de visite peut n'être qu'une vexation inutile dont il est préférable de s'abstenir.

87. Les navires neutres sous convoi de leur pavillon sont, en principe, exempts de visite. Toutefois vous agirez à leur égard comme il est dit à l'article suivant.

Article XII.

PROCÉDURE DE LA VISITE—SEMONCE—VISITE—PAPIERS DE BORD—RÉSISTANCE À LA VISITE—CONVOI.

88. *Semonce.*—Lorsque vous serez déterminé à visiter un navire, vous l'avertirez l'abord en tirant un coup de canon de semonce à poudre et en arborant votre pavillon. A ce signal, le navire est tenu aussi d'arborer ses couleurs et de s'arrêter pour attendre votre visite.

89. S'il continue sa route et cherche à fuir, vous le poursuivrez et l'arrêterez au besoin par la force.

90. En cas de résistance armée de sa part, vous le capturerez sans autre examen.

La tentative de fuite ne suffit pas à elle seule à justifier la capture.

91. Dès que la navire semoncé s'est arrêté, vous lui envoyez une embarcation.

Aucune règle précise ne peut être fixée au sujet de la distance à laquelle doit s'arrêter le croiseur pendant la visite. Vous agirez suivant les circonstances et l'état de la mer.

92. *Visite.*—Un officier en armes, accompagné de deux ou trois hommes au plus, monte à bord du navire à visiter. Si vous êtes seul officier à votre bord, la visite pourra être effectuée par un officier-marinier.

93. Avant tout, l'officier visiteur doit procéder à l'examen des papiers de bord.[1]

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[1] Voir Album des papiers de bord.

94. Les principaux papiers de bord des navires de commerce sont :

1° L'acte constatant la nationalité ;

2° Éventuellement l'acte de propriété (voir § 108 et suiv.) ;

3° Le congé ;

4° Le permis de navigation ou certificat de navigabilité ;

5° Le rôle d'équipage et la liste des passagers ;

6° La patente de santé ;

7° Le journal de bord ;

8° Le manifeste de chargement ;

9° La charte-partie (si le navire est affrété) et les connaissements dûment signés ;

10° L'inventaire.

95. L'examen de ces pièces vous renseignera sur la nationalité du navire, sur sa destination et sa route, ainsi que sur la nature et la destination apparente du chargement.

96. Éventuellement, vous pourrez demander à vous faire présenter :

Le journal des machines ;

La police d'assurance du navire et celle des marchandises, si elles sont à bord ;

Le registre des télégrammes reçus et envoyés si le navire est muni de T. S. F.

97. Si l'examen de ces pièces démontre d'une manière certaine la neutralité du navire, sa destination inoffensive et le caractère inoffensif de son chargement, l'officier visiteur constatera le résultat de sa visite sur le journal de bord dudit navire, et vous laisserez le navire continuer sa route.

L'absence de l'une des pièces ci-dessus indiquées ne justifierait pas seule la capture, si d'ailleurs l'ensemble des autres pièces prouvait la neutralité du navire et la régularité de l'expédition.

Papiers jetés à la mer, supprimés ou distraits.

98. Toutefois, s'il est constaté qu'un ou plusieurs de ces papiers ont été jetés à la mer, supprimés, distraits ou falsifiés, le navire visité doit être capturé sans qu'il soit besoin d'examiner par qui ou pour quelle cause ils ont été jetés à la mer, supprimés, distraits ou falsifiés.

99. Si l'examen des pièces vous laisse un doute quelconque ou vous confirme un soupçon :

1° Sur la nationalité du navire : alors vous le capturerez ;

2° Sur sa destination ou sur le caractère inoffensif de son chargement : alors vous pourrez procéder à la visite de la cargaison.

Cette visite s'effectue par les soins du capitaine et de l'équipage du navire visité, sous les yeux de l'officier visiteur, lequel ne doit y procéder par lui-même qu'en cas de refus de ces derniers.

100. Les papiers de bord font preuve complète de l'itinéraire du navire ainsi que du lieu de déchargement des marchandises, à moins que ce navire ne soit rencontré ayant manifestement dévié de la route qu'il devait suivre d'après ses papiers de bord et sans pouvoir justifier d'une cause suffisante de cette déviation.

101. Toutes ces opérations de visite doivent être faites avec la plus grande courtoisie et modération, et, s'il s'agit de paquebots postaux, avec toute la célérité possible. (Voir § 85 et 126.)

102. *Résistance à la visite.*—La résistance opposée par la force à l'exercice légitime des diverses opérations de la visite rend immédiatement le navire passible de capture et ultérieurement de confiscation. Le chargement sera passible du même traitement que subirait le chargement d'un navire ennemi; les marchandises appartenant au capitaine ou au propriétaire du navire seront considérées comme marchandises ennemies.

103. *Convoi.*—En ce qui concerne les navires sous convoi, le commandant du convoi vous donnera par écrit, à votre demande, sur le caractère des navires convoyés et sur leur chargement, toutes informations que la visite servirait à obtenir.

194. Si vous avez lieu de soupçonner que la religion du commandant du convoi a été surprise, vous lui communiquerez vos soupçons. C'est au commandant du convoi seul qu'il appartient, en ce cas, de procéder à une vérification. Vous pourrez cependant accepter l'offre qu'il vous ferait d'assister à cette vérification. Il devra constater le résultat de cette visite par un procès-verbal dont une copie sera remise à l'un de vos officiers. Si des faits ainsi constatés justifiaient, dans l'opinion du commandant du convoi, la saisie d'un ou de plusieurs navires, la protection du convoi devrait leur être retirée, et vous procéderiez à cette saisie.

105. Si des divergences s'élèvent entre vous et le commandant du convoi, notamment à propos de la contrebande, vous pourrez seulement lui adresser une protestation écrite. Vous m'en rendrez compte immédiatement, et la difficulté sera réglée par la voie diplomatique.

106. Le fait, pour un neutre, de se faire convoyer par un bâtiment de guerre ennemi, c'est-à-dire se placer sous sa protection, le rend suspect et forclos du droit de se plaindre s'il est atteint d'avaries ou même détruit dans le combat.

107. Le fait, par un navire de commerce ennemi, de se faire convoyer par un bâtiment de guerre ennemi l'expose à toutes vos attaques, directes et indirectes.

Article III.

CHANGEMENT DE NATIONALITÉ DES NAVIRES—TRANSFERT DE PAVILLON.

108. Lorsqu'il résulte de l'examen des pièces de bord que le navire est passé récemment sous pavillon neutre, il y a lieu de

procéder avec la plus grande attention et de s'inspirer des règles suivantes:

109. Le transfert sous pavillon neutre d'un navire ennemi, effectué avant l'ouverture des hostilités, est valable à moins qu'il ne soit établi que ce transfert a été effectué en vue d'éluder les conséquences qu'entraîne le caractère de navire ennemi. Il y a néanmoins présomption de nullité si l'acte de transfert ne se trouve pas à bord, alors que le navire a perdu la nationalité belligérante moins de soixante jours avant l'ouverture des hostilités; la preuve contraire est admise.

110. Il y a présomption absolue de validité d'un transfert effectué plus de trente jours avant l'ouverture des hostilités, s'il est complet, absolu, conforme à la législation des pays intéressés et s'il a cet effet que le contrôle du navire et le bénéfice de son emploi ne restent pas entre les mêmes mains qu'avant le transfert. Toutefois, si le navire a perdu la nationalité belligérante moins de soixante jours avant l'ouverture des hostilités et si l'acte de transfert ne se trouve pas à bord, la saisie du navire ne pourra donner lieu à des dommages et intérêts.

111. Si, d'après ces considérations, vous estimez suffisante la présomption de nullité de l'acte de transfert, vous capturerez le navire suspect.

112. Le transfert sous pavillon neutre d'un navire ennemi, effectué après l'ouverture des hostilités, est nul, à moins qu'il ne soit établi que ce transfert n'a pas été effectué en vue d'éluder les conséquences qu'entraîne le caractère de navire ennemi, par exemple par suite d'héritage.

113. Toutefois il y a présomption absolue de nullité:

1° Si le transfert a été effectué pendant que le navire est en voyage ou dans un port bloqué;

2° S'il y a faculté de réméré ou de retour;

3° Si les conditions auxquelles est soumis le droit de pavillon, d'après la législation du pavillon arboré, n'ont pas été observées.

114. Ces règles ne sont, bien entendu, pas applicables lorsque la vente du navire ennemi à un sujet neutre a été effectuée par les autorités françaises, à la suite d'une prise.

Article XIV.

CAPTURE—SAISIE—FORMALITÉS DE LA CAPTURE.[1]

115. La visite est suivie de capture ou de saisie lorsqu'elle révèle ou confirme soit le caractère ennemi du navire, soit une violation de blocus, soit le caractère de contrebande de son chargement.

116. Si la visite ne détermine pas la saisie du bâtiment, l'officier qui en aura été chargé devra seulement la constater sur les papiers

[1] Voir également décret sur le service à bord des bâtiments de la marine militaire du 15 mai 1910, art. 368, 369, 407.

de bord. Si, au contraire, elle détermine la saisie ou la capture, il devra être procédé ainsi qu'il suit :

1° S'emparer de tous les papiers de bord et les mettre sous scellés après en avoir dressé inventaire ;

2° Dresser un procès-verbal de capture ou de saisie portant inventaire sommaire du bâtiment (voir Annexes III, Formules H et I), dont un exemplaire sera remis au capitaine du navire capturé ou saisi ;

3° Constater l'état du chargement, puis faire fermer les écoutilles de la cale, les coffres, les soutes et y apposer les scellés ;

4° Dresser un état des effets, argent, instruments nautiques, et autres objets appartenant au capitaine et à l'équipage. S'ils ne sont pas laissés à leur disposition, mention en sera faite au procès-verbal ;

5° Mettre à bord un équipage pour la conduite de la prise et en donner le commandement à un officier ou à un officier-marinier, en lui remettant une lettre de conducteur de prise et vos instructions.

117. *Capture des corsaires ou des pirates.*—En cas de prise d'un corsaire régulièrement pourvu de lettres de marque par un Gouvernement n'ayant pas adhéré à la Déclaration de Paris, vous procederez de la même manière. Le capitaine, les officiers et l'équipage de ce corsaire seront traités comme il est dit au paragraphe 146 pour les bâtiments de guerre.

Le capitaine, les officiers et l'équipage de tout navire armé en course par un Gouvernement signataire de la Déclaration de 1856, étant passibles des peines prévues pour le crime de piraterie, devront être considérés non comme prisonniers de guerre, mais comme détenus, et remis aux autorités françaises les plus proches pour être poursuivis conformément aux lois de la République.

118. *Capture des bâtiments de guerre.*—Dans le cas de capture d'un bâtiment de guerre, vous vous bornerez à le constater sur votre journal et vous pourvoirez à la conduite de la manière la plus conforme à la sécurité des équipages auxquels vous la confierez. (Décret du 15 mai 1910 sur le service à bord des bâtiments de la Flotte, art. 368, 369, 407.)

Article XV.

USAGE DE LA TÉLÉGRAPHIE SANS FIL.

119. Si les circonstances l'exigent et dans la mesure où vous le jugerez indispensable, vous pourrez notifier aux navires de commerce munis d'une installation de T. S. F. qui séjourneraient dans la zone de vos opérations, ou même qui la traverseraient, l'interdiction :

De transmettre des nouvelles sur votre situation ou sur vos mouvements ;

D'enregistrer des télégrammes clairs ou chiffrés provenant de votre bâtiment ou des bâtiments de votre force navale;

D'émettre des signaux de nature à troubler vos communications.

Vous fixerez alors par une déclaration et une notification analogues à celles qui concernent le blocus, les limites géographiques et, le cas échéant, les limites de temps ou d'heures entre lesquelles s'étendra le régime de vos interdictions.

120. Si, malgré votre notification, les navires susvisés transmettent des nouvelles interdites ou troublent systématiquement vos communications, vous agirez suivant la gravité et les conséquences de leurs actes, soit comme il est prévu à l'article 4 de la Convention X de La Haye pour l'application à la guerre maritime des principes de la Convention de Genève, soit comme il est dit pour le deuxième cas visé au paragraphe 55 (assistance hostile).

Vous pourrez donc enjoindre à ces navires de s'éloigner hors des limites fixées dans votre déclaration, leur imposer une direction déterminée, les détenir, même les capturer et, dans tous les cas, saisir leurs appareils de T. S. F.

121. Si la visite de ces navires vous révèle simplement l'enregistrement de dépêches interdites, vous pourrez saisir leur registre de télégrammes, leur enjoindre de s'éloigner, leur fixer une direction déterminée, et, si vous avez des motifs suffisants de suspecter leur bonne foi, saisir leurs appareils de T. S. F.

Article XVI.

de la correspondance postale.[1]

122. La correspondance postale des neutres ou des belligérants, quel que soit son caractère officiel ou privé, trouvée en mer sur un navire neutre ou ennemi, est inviolable. S'il y a saisie du navire, elle est expédiée avec le moins de retard possible par le capteur.

123. Les dispositions précédentes ne s'appliquent pas, en cas de violation de blocus, à la correspondance qui est à destination ou en provenance de port bloqué.

124. Elles ne sont également applicables qu'entre les puissances qui ont ratifié la Convention de La Haye du 18 octobre 1907 relative à certaines restrictions à l'exercice du droit de capture dans la guerre maritime, ou qui ont adhéré à cette Convention, et seulement si les belligérants sont tous parties à cette Convention.

125. Dans le cas des paragraphes 123 et 124, vous pourrez prendre connaissance des lettres officielles ou particulières adressées aux autorités ennemies ou à des personnes résidant sur le territoire de l'ennemi ou occupé par lui et trouvées à bord des

[1] XI[e] Convention de la 2[e] Conférence de La Haye du 18 octobre 1907.

bâtiments capturés; s'il en est qui présentent de l'intérêt, vous les adresserez sans délai au Ministre de la Marine, vous expédierez les autres à leur destination avec le moins de retard possible.

Article XVII.

PAQUEBOTS.[1]

126. L'inviolabilité de la correspondance postale ne soustrait pas les paquebots-poste neutres aux lois et coutumes de la guerre sur mer concernant les navires de commerce neutres en général. Toutefois la visite n'en doit être effectuée qu'en cas de nécessité, avec tous les ménagements et toute la célérité possibles. (Voir Annexe I, Convention postale franco-britannique du 30 août 1890.)

Article XVIII.

PAVILLON DES PRISES.

127. Tout navire capturé navigue avec le pavillon et la flamme, insignes des bâtiments de guerre.

Article XIX.

ENVOI DES PRISES DANS LES PORTS FRANÇAIS—CONDITIONS DE SÉJOUR ÉVENTUEL DES PRISES DANS LES EAUX NEUTRES.[2]

128. Sauf le cas de force majeure indiqué ci-dessous, les prises sont dirigées sur les ports de France ou des possessions françaises, ou appartenant à un Gouvernement allié.

129. Une prise ne peut être amenée dans un port neutre que pour cause d'innavigabilité, de mauvais état de la mer, de manque de combustible ou de provisions. Elle doit repartir aussitôt que la cause qui en a justifié l'entrée a cessé.

Le capteur se mettra en rapport avec le consul de France et se concertera avec lui sur la destination ultérieure de la prise.

130. Si la prise, en mesure de sortir des eaux neutres, retardait son départ ou ne se conformait pas à l'ordre de partir immédiatement qui lui aurait été notifié par la Puissance neutre, cette dernière serait dans son droit strict en usant des moyens dont elle dispose pour relâcher la prise avec ses officiers et son équipage, et interner l'équipage mis à bord par le capteur.

131. Vous pourrez d'ailleurs considérer comme port pour la mise sous séquestre des navires et des marchandises tout port

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[1] XI[e] Convention de La Haye relative à certaines restrictions à l'exercice du droit de capture dans la guerre maritime.

[2] XIII[e] Convention de La Haye concernant les droits et les devoirs des puissances neutres en cas de guerre maritime.

occupé par nos forces, où il pourra être procédé aux actes d'instruction et d'administration prescrits par les lois et règlements de la République.

132. Bien que, aux termes de l'article 23 de la XI° Convention de La Haye, une Puissance neutre ait la faculté de permettre l'accès de ses ports et rades aux prises escortés ou non, lorsqu'elles y sont amenées pour être laissées sous séquestre en attendant la décision du tribunal des prises, vous ne chercherez à user de cette autorisation que si les circonstances vous y obligent et qu'après vous être assuré que ladite Puissance neutre permettra réellement l'accès de ses ports et rades à vos prises dans les conditions de l'article 23 précité.

133. Si le port neutre dans lequel il se présente lui est interdit absolument, ou si sa présence n'y est tolérée que pour un temps insuffisant, le capteur ou le conducteur d'une prise défère aux invitations qui lui sont adressées par le Gouvernement du pays où il se trouve. Il agit alors au mieux des intérêts dont il est chargé, et rend compte sans délai au Ministre de la Marine du refus qu'il a éprouvé.

Article XX.

PIÈCES À REMETTRE PAR LES CONDUCTEURS DE PRISES.

134. Si le capteur n'escorte pas sa prise parce qu'il juge pouvoir l'expédier directement, le conducteur de la prise doit, à son arrivée au port de destination, remettre à l'autorité maritime :

1° Son rapport de traversée ;

2° Les pièces et documents de toute nature visés au paragraphe 116.

Une copie certifiée du procès-verbal de capture et d'apposition des scellés restera entre les mains du capteur.

Il importe à tous les points de vue que le capteur n'omette aucune de ces formalités réglementaires (B. O. R., t. IV, p. 67).

Article XXI.

DU RÉGIME DES ÉQUIPAGES DES NAVIRES DE COMMERCE ENNEMIS CAPTURÉS.[1]

135. Lorsque vous aurez capturé un navire de commerce ennemi, les hommes de son équipage, nationaux d'un État neutre, ne seront pas faits prissonniers de guerre.

136. Il en sera de même du capitaine et des officiers, également nationaux d'un État neutre, s'ils promettent formellement par écrit de ne pas servir sur un navire ennemi pendant la durée de la guerre.

[1] XI[e] Convention de La Haye, Chap. III, Formule R.

137. Le capitaine, les officiers et les membres de l'équipage, nationaux de l'État ennemi, ne seront pas faits prisonniers de guerre, à la condition qu'ils s'engagent, sous la foi d'une promesse formelle écrite, à ne prendre pendant la durée des hostilités aucun service ayant rapport avec les opérations de la guerre.

138. Vous remettrez aux intéressés reçu des promesses qu'ils auraient faites dans les termes des paragraphes 136 et 137. En outre, vouz aurez soin de me faire connaître et de porter à la connaissance de l'ennemi, par toutes voies possibles, les noms des individus laissés libres dans les conditions visées aux susdits paragraphes.

139. Les dispositions ci-dessus ne s'appliquent pas aux navires qui prennent part aux hostilités.

140. Dans le cas où vous n'y verriez aucun danger, vous pourriez maintenir à leur bord le capitaine et tout ou partie de l'équipage du navire de commerce capturé.

141. Les individus qui n'auront pas conservé leur liberté dans les conditions des paragraphes 135 et 136 seront prisonniers de guerre.

142. Toute personne trouvée à bord d'un navire de commerce ennemi est, sauf preuve contraire, présumée de nationalité ennemie.

Article XXII.

DU RÉGIME DES PASSAGERS TROUVÉS À BORD DES NAVIRES CAPTURÉS.

143. Les passagers sont libres et peuvent débarquer dans le premier port où le bâtiment aborde.

144. Toutefois les hommes de 18 à 50 ans nationaux de l'État ennemi et qui ne tombent pas sous le coup des paragraphes 59, 60 de l'Article IX seront traités comme il est dit ci-dessus à l'Article XXI, pour le capitaine, les officiers et les membres de l'équipage nationaux de l'État ennemi.

Article XXIII.

EXPÉDITION DIRECTE DES PIÈCES ET DES PERSONNES.

145. Dans des circonstances exceptionnelles, le capteur peut expédier directement au port de prise, avec les pièces de procédure, les personnes (capitaine, officiers, ou membres de l'équipage du navire capturé, au nombre de trois au moins) dont la présence est nécessaire à l'instruction de la prise.

Leur arrivée devra précéder celle de la prise elle-même.

Article XXIV.

ÉQUIPAGES DES BÂTIMENTS DE GUERRE CAPTURÉS.

146. Si le navire capturé est un bâtiment de guerre, vous transborderez le capitaine, la majeure partie des officiers, une portion

de l'équipage, et vous conduirez ces prisonniers dans un port français ou allié, ou occupé par les forces armées françaises ou alliées. (Voir décret du 15 mai 1910 sur le service à bord des bâtiments de la marine militaire, art. 339, 368, 369, 406, 407.)

Article XXV.

PRISE PERDUE PAR FORTUNE DE MER.

147. Si une prise est perdue par fortune de mer, il importe de constater le fait avec le plus grand soin et d'en faire l'objet d'un rapport adressé sans délai au Ministre de la Marine.

Article XXVI.

RÉARMEMENT ET EMPLOI DES NAVIRES CAPTURÉS.

148. Si l'intérêt public l'exige, vous pourrez réarmer les navires ennemis capturés et les employer pour les besoins du service, après en avoir, autant que possible, fait dresser un inventaire sommaire avec estimation.

149. Vous pourrez également utiliser, pour le service de la flotte, les cargaisons des navires ennemis, après en avoir fait dresser un inventaire estimatif détaillé.

150. Vous aurez également la faculté d'en agir ainsi pour les approvisionnements du navire, notamment pour les combustibles et les matières grasses.

151. Les procès-verbaux rédigés en exécution de ces dispositions devront être joints au dossier de la prise; un double en sera adressé au Ministre de la Marine, et un autre au capitaine du navire capturé.

Article XXVII.

INTERDICTION DE LA RANÇON.

152. Il vous est interdit de consentir un traité de rançon.

Article XXVIII.

DESTRUCTION DES PRISES ENNEMIES.

153. Les prises doivent être amarinées, conduites dans un port national ou allié, et non pas détruites.

Par exception, vous êtes autorisé à détruire toute prise dont la conservation compromettrait votre propre sécurité ou le succès de vos opérations, notamment si vous ne pouvez conserver la prise sans affaiblir votre équipage.

154. Avant la destruction, vous mettrez en sûreté les personnes, quelles qu'elles soient, qui se trouvent à bord, ainsi que tous les papiers et documents utiles pour le jugement de la prise.

155. En cas de combat provoqué par une résistance armée, ceux qui montent le navire suivent la fortune des armes.

Article XXIX.

DESTRUCTION DES PRISES NEUTRES—DESTRUCTION DES MARCHANDISES.

156. Un navire neutre capturé ne peut être détruit par le capteur; mais il doit être conduit dans un port national ou allié, pour y être statué ce que de droit sur la validité de la capture.

157. Par exception, un navire neutre capturé et dont la confiscation vous apparaîtrait certaine peut être détruit, si sa conservation et son convoi peuvent compromettre la sécurité de votre bâtiment ou le succès des opérations dans lesquelles vous êtes engagé.

158. Avant la destruction, les personnes qui se trouvent à bord devront être mises en sûreté, et tous les papiers de bord et autres pièces que les intéressés estimeront utiles pour jugement sur la validité de la capture devront être transbordés sur votre bâtiment.

159. Je vous rappelle que le capteur qui a détruit un navire neutre doit, préalablement à tout jugement sur la validité de la capture, justifier en fait avoir agi en présence d'une nécessité exceptionnelle dans le sens du paragraphe 157.

160. Si le navire n'est pas sujet à confiscation ou s'il y a doute, vous aurez la faculté d'exiger la remise ou de procéder à la destruction des marchandises confiscables trouvées à bord dudit navire, lorsque les circonstances justifieraient la destruction d'un navire passible de confiscation. Vous mentionnerez alors les objets livrés ou détruits sur le livre de bord du navire arrêté, et vous ferez remettre par le capitaine copie certifiée conforme de tous papiers utiles. Lorsque la remise ou la destruction a été effectuée et que les formalités ont été remplies, le capitaine doit être autorisé à continuer sa route.

L'oubli de ces formalités engage la responsabilité du capteur.

Article XXX.

RECOUSSE.

161. En cas de capture par l'ennemi d'un bâtiment national ou allié, vous devez vous efforcer d'en opérer la recousse.

Dans ce cas et dans celui où vous reprendriez sur l'ennemi un bâtiment neutre, vous retiendrez le personnel militaire ennemi

trouvé à bord, et vous relâcherez purement et simplement le navire.

Pour le personnel ennemi non militaire trouvé à bord du même navire, vous vous conformerez aux articles 6 et 7 de la Convention XI de La Haye.

ARTICLE XXXI

APPLICATION DES PRINCIPES DE LA CONVENTION CONCERNANT LES LOIS ET COUTUMES DE LA GUERRE SUR TERRE (IV^{e} CONVENTION ET RÈGLEMENT ANNEXE DE LA 2^{e} CONFÉRENCE DE LA HAYE).

162. Si vous êtes conduit à opérer un débarquement et à poursuivre vos opérations à terre, vous observerez les prescriptions de la Convention IV de La Haye concernant les lois et coutumes de la guerre sur terre et du règlement annexé à ladite Convention.

ARTICLE XXXII.

BOMBARDEMENT PAR DES FORCES NAVALES EN TEMPS DE GUERRE.

163. Vous vous conformerez strictement aux dispositions de la IX^{e} Convention de La Haye, du 18 octobre 1907, concernant le bombardement par des forces navales en temps de guerre.

ARTICLE XXXIII.

POSE DES MINES SOUS-MARINES AUTOMATIQUES DE CONTACT.

164. Vous vous conformerez également aux dispositions de la VIII^{e} Conférence de La Haye, du 18 octobre 1907, relative à la pose des mines sous-marines automatiques de contact.

ARTICLE XXXIV.

165. Les présentes instructions entreront immédiatement en vigueur.

166. Sont et demeurent abrogées toutes des dispositions contraires.

DELCASSÉ,
Le Ministre de la Marine.

Paris, le 19 décembre 1912.

INDEX.